THE LAW OF SALES.

VOLUME II.

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COMMENTARIES

ON

THE LAW OF SALES

AND

COLLATERAL SUBJECTS.

BY

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COMMENTARIES ON SALES.

BOOK III.

PART I.

RAILWAY STATION-AGENTS AND SHIPMASTERS FRAUDULENTLY SIGNING FREIGHT RECEIPTS AND BILLS OF LADING.

Erb *v.* The Great Western Railway Co. of Canada[1] is a case where C., who was the freight-agent of the defendants at Chatham, Ontario, and a partner in the firm of B. & Co., caused printed receipts, or shipping-notes, in the form commonly used by the railway company, to be signed by his name as the company's agent, in favor of his firm, B. & Co., for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from B. & Co. the flour addressed to the plaintiffs, and were attached to drafts drawn by B. & Co.; accepted and subsequently paid by plaintiffs. C. received the proceeds of the drafts, and absconded. In an action brought by the plaintiffs against the railway company for the amount of the drafts, it was held, by the majority of the court, that the act of C. in issuing a false and fraudulent receipt for goods never delivered to the company, was not an act done within the scope of his authority as the company's agent, and that the defendants, therefore, were not liable.

It was very strenuously urged for the plaintiffs that the freight-agent was acting within the scope of his authority in signing the freight receipts; that the rule of law applied to this case, that, where one of two innocent persons must bear a loss, it should be he who by care could have prevented the loss that should bear it; and that a distinction exists between such cases as this and those where shipmasters sign bills of lading. There was, also, a position taken with reference to a local statute which it is not neces-

[1] 5 S. C. of Can. R. 179.

sary to consider here. Two of the members of a court of six concurred in the views of the plaintiffs' counsel.

The judgment of Ritchie, C. J., which is that of the majority of the court, is very lengthy, and as the question is one of much importance, and as the conclusion reached is one with which we agree (although not, by any means, with all the reasoning the judgment contains, — much of which is fallacious), we quote fully from the judgment in our note below.[1]

[1] After referring, at considerable length, to the pleadings and facts in the case, Ritchie, C. J., proceeds as follows: "We must then consider whether the defendants are to be bound by the acts of Carruthers as the agent, and are to be held responsible in like manner as if they, with knowledge that the goods had not been received or shipped, had issued or directly authorized the issuing of this receipt or bill of lading, or after its issue had acquiesced in the act and derived benefit and advantage therefrom. The mere giving a receipt for goods and issuing a bill of lading without any goods having been received, was clearly not within the usual scope of the employment of a freight agent, such as Carruthers is shown to have been. It was only when he had actually received goods to be shipped that the giving a receipt and bill of lading for such goods was within the usual scope of his employment. It was never within the scope of his employment that he should create, for his own illicit gain, as instruments of fraud, 'false pretences of contracts having the semblance of bills of lading.' Such bills of lading as he issued did not grow out of any transaction between T. Brown & Co. and defendants, or between the plaintiffs and defendants, or out of the use of the railway as a means of transportation by either T. Brown & Co., or the plaintiffs. They were simulated bills of lading, the result of the direct fraud and forgery or deceit of T. Brown & Co., by their leading partner, Carruthers; and, if plaintiffs accepted and paid bills on the faith of such documents, their doing so was induced by the act of T. Brown & Co., and not by any act of the defendants, either directly or by Carruthers as their agent, while acting within the scope of the authority conferred upon him by the defendants. I fail to see how such a wilful fraud committed by T. Brown & Co., through their partner Carruthers, on plaintiffs, with whom they were dealing, can be considered an act within Carruthers's agency. The authority of Carruthers was a limited authority. His power and authority to sign a bill of lading depended on the actual receipt and shipping of the goods. If the fact on which the authority depended did not exist, the authority could not exist. The cases of Grant *v.* Norway, 10 C. B. 665; Hubbersty *v.* Ward, 8 Exch. 330; and Coleman *v.* Riches, 16 C. B. 104, appear to me in principle directly in point. In Grant *v.* Norway, 10 C. B. 665, the marginal note is as follows: 'The master of a ship signing a bill of lading for goods which have never been shipped is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed.' During the argument, Jervis, C. J., says: 'If the master's authority is to sign bills of lading only upon receiving the goods on board, the owner does not hold him out as his agent until he receives the goods.' After pointing out the very large authority of a master of a ship, and adopting from Smith's Mercantile Law (p. 59) that 'the master is *a general agent* to perform all things relating to the usual employment of his ship; and the authority of such an agent to perform *all things usual in the line of business in which he is employed* cannot be limited by any private order or direction not known to the party dealing with him,' asks, Is it then, usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? For all parties concerned have a right, he says, to assume that an agent has authority to do all that is usual. He then points out that 'the very nature of a bill of lading shows that it ought not to be signed until the goods are on board;' for it begins by describing them as shipped. He says: 'It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped; nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not.' He then adds: 'If, then, from the usage of trade, and the general practice of shipmasters, it is generally known that the master derives no such authority from his

The matter is settled in England on unquestionable authority. The main point involved is as to the nature of the agency of the

position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped.' This case was followed by Hubbersty *v.* Ward (8 Exch. 330): 'The master of a vessel has no power to charge his owner by signing bills of lading for a greater quantity of goods than those on board.' The authority of Grant *v.* Norway was conceded, but it was attempted to distinguish this case from Grant *v.* Norway; but Pollock, C. B., delivering the judgment of the court, says: 'We think that when a captain has signed bills of lading for a cargo that is actually on board his vessel, his power is exhausted. He has no right, or power, by signing other bills of lading for goods which are not on board, to charge his owner.' This case was followed by Coleman *v.* Riches (16 C. B. 104), where the same principle was applied to the agent of a wharfinger, who signed a receipt in the usual form for the delivering of corn at defendant's wharf. In the course of the argument, Jervis, C. J., says: 'The authority of the man was of a limited character. He was only authorized to give receipts when the wheat was actually delivered.' In delivering judgment: 'This, however, is simply the case of a wharfinger's receipt note, and that being so, the case is disposed of. Board, the defendant's agent, had only authority to give receipts for goods which had, in fact, been delivered at the wharf. And again, when Board gave a receipt for wheat which had never been delivered at the wharf, he was not acting within the scope of his authority. He was not acting for his master, but contrary to his duty and against his master's interest.'

"With how much more force does this reasoning and the conclusions arrived at in these cases apply to the present case! The authority of the freight agent cannot, in my opinion, be compared in extent with the general authority of a master of a ship, who is intrusted with the whole control and management of the property, and that for the most part in the absence of the owner, and when the vessel is out of his reach. Here the authority of the agent was, necessarily, of a most limited character. He was to receive and ship, and give receipts and bills of lading for goods actually received and shipped. Outside of this, he does not appear to have possessed any authority whatever; nor was any other or greater authority necessary to enable him to manage and conduct that part of the business of defendants' railway confided to him. He, certainly, was not authorized to grant receipts for goods unless the goods were actually received, nor was he empowered to contract for the company that goods should be sent by the company, when no goods were ever received by the company to be sent. Nor, in like manner, had he any authority to sign a bill of lading declaring the property was shipped in apparent good order, when it never was shipped, and declaring the property was to be delivered in like good order, when there was no property in the possession of the company or of their agent to be delivered. It may be even questioned whether the general manager of this railway could legally issue or authorize to be issued bills of lading for goods never received and never shipped, such an act being wholly inconsistent with the object of a railway company, which is incorporated to transport goods delivered to them for transportation, not to issue feigned and fraudulent receipts and bills of lading for goods never received to be forwarded. Be this as it may, it cannot be doubted that every person in business who deals with a railway company knows that, in the ordinary and usual course of business, no such receipts and bills of lading are ever given or issued unless the goods have been actually received to be shipped, and nobody so dealing but must know that it a freight agent, discharging the ordinary duties of a freight agent, did give or issue such receipts and bills of lading without the goods having been delivered, he would be acting in direct opposition to his duty and in fraud of his principals, and no one would knowingly act on a bill of lading so issued, when goods had never been delivered or actually shipped, unless indeed it could be shown that some specific authority had been given to the agent outside of the ordinary course of business, authorizing the signing of such documents without delivery of the articles. I cannot conceive it possible, in the usual course of business, that any business firm would accept drafts on their mere production, with bills of lading attached, without any notice or advice, or without anything indicating the nature of the transaction. It is very different from the buying or negotiating a bill of exchange, and the position of a holder for value of a bill of exchange

shipmaster, or freight-agent of the railroad. We think it is clear that the powers of a freight-agent of a railway are cer-

purchased on the market is very different from that of a person accepting a bill of exchange drawn on him. No one, I take it, in the usual and ordinary course of business, draws on another in whose hands he has no funds, but on the strength of funds to be supplied, without advising that the funds against which he draws will be forthcoming; and, therefore, in a case like the present, where the plaintiff alleges that the transaction originated on a contract with the drawers, that on certain conditions they would accept, — that is, on goods consigned they would advance by accepting drafts, — can it be supposed that those who were to draw drew without advising the shipping of the goods and the drawing against them through the bank for their value? Can it be doubted that the acceptance of the bills so drawn was on the strength of such advice rather than on that of the bill of lading? Bills of lading attached are generally more for the security of the drawer than the drawee. It is that the goods shall not be delivered over until the bills are accepted; in other words, that the consignees shall not receive the goods till they have secured the payment by accepting the bills drawn for their price. In this case the transaction in connection with the bills, with which the railway had nothing to do, was an illusion and a fraud. The consideration on which the bills were drawn, and the consideration on which the plaintiffs accepted the bills never existed. The bills were drawn against flour to be shipped and for the price of the flour, on the sale of which the plaintiffs were to make a commission. The flour never was shipped. There never was any property on the sale of which the plaintiffs could make a commission, and the reason was that the parties with whom the plaintiffs dealt deceived them, and have endeavored to cover their deceit by transmitting to their dupes feigned documents as purporting to have been legitimately issued by defendants' authority. I can only look on this as a case of fraud, pure and simple. Carruthers, in signing these receipts and bills, was not acting within the scope of his authority, or in the course of his employment, or for his employers' benefit, and the company never adopted Carruthers's act or profited by his fraud. Carruthers had no authority to make statements or representations. He was employed to receive goods, and, on receipt, to give acknowledgments therefor; to ship the goods so received, and, on such shipment, to give bills of lading; in other words, to sign a contract for their transportation and delivery. As said by Cresswell, J., in Coleman *v.* Riches (16 C. B. 104): 'He was not employed to represent that to be true which he knew to be false.' His position was, as described by Crowder, J., in the same case, that 'of a servant whose only duty was to give a receipt when the goods had been delivered.' The case we are dealing with is, in my opinion, much stronger against plaintiffs than those I have referred to, because it is quite impossible in this transaction to separate plaintiffs from T. Brown & Co.; and, equally impossible to separate T. Brown and Co. from Carruthers, who, unquestionably, was the leading partner; in fact, substantially the firm of T. Brown & Co.; and, therefore, so far as the defendants are concerned, plaintiffs must be looked upon as, if not identical with Carruthers, as immediately connected with him, and cannot fix on the defendants a liability growing out of a breach of T. Brown & Co.'s contract with them as set out in the declaration, and out of the fraudulent conduct of T. Brown & Co. in drawing against goods they never shipped, and fraudulently transmitting bills of lading of their own fraudulent concoction. No doubt T. Brown & Co. were, by reason of the employment of their leading member, enabled the more easily to perpetrate and carry out successfully this fraud. Still, I think this fraud of T. Brown & Co. in their dealings with plaintiffs, cannot be attributed to the company. The defendants had no knowledge of the transaction between T. Brown & Co. and plaintiffs. The falsehood, fraud, and knowledge were on the part of T. Brown & Co., with whom plaintiffs contracted, and who, instead of shipping the flour to plaintiffs, on the security of which the advances were to be made, and procuring *bonâ fide* bills of lading or shipping receipts therefor, from defendants, in fulfilment of their contract with plaintiffs, falsely and fraudulently, by their senior and principal partner, made out a false and fraudulent bill of lading or shipping receipt, purporting to be the bill of lading or the receipt of the defendants; and, thereby, falsely and fraudulently represented to plaintiffs that they had fulfilled their contract and had shipped and assigned to him the flour in question, and had procured from defendants a bill of lading and shipping receipt therefor; when in truth and in fact the flour never had been consigned and shipped to plaintiffs, nor

tainly not greater to bind the railway by a false statement as to the receipt of goods, alleged to have been received by the railway, than are those of a shipmaster, by a similar false statement, to bind the ship or its owners. In both cases the main ground upon which it is sought to clothe them with such powers is, that, where one of two innocent persons must suffer by the fraud of a third, the loss must fall upon that one of the two who, by his placing the third in a position of trust or confidence, enabled the third person to commit the fraud. But there is a limitation to this doctrine. It is a pure question of the nature of the agency. A principal is liable only for the fraud of the agent committed within the scope of his employment. Thus, the mere fact that a merchant has clerks in his employment does not, therefore, necessarily clothe them with the power to bind him by their acceptances of bills of exchange, fraudulently accepted by them out of the scope of their employment. Nor, where a master sends his servant to purchase goods for cash, and he fraudulently buys them on credit, is the master bound by the act of his servant, without the scope of his employment. So, as the shipmaster is only the agent of necessity for the sale of the ship, no title to the ship passes to the purchaser unless he can affirmatively make out the necessity for the sale, and thereby show that the act was done by the master as such agent of necessity, within the scope of his employment. In the same way, as the master is only the agent of the ship and owners to sign bills of lading

delivered to be shipped, and defendants never had given any bill of lading or shipping receipt therefor. This was a roguish transaction on the part of T. Brown & Co. through their senior and principal partner, whereby they sought and obtained advances from the bank, not on the strength of flour consigned by them to plaintiffs, but on the strength of a false bill of lading concocted by themselves; handed to the bank with a draft on plaintiffs, which the bank, in ignorance of the fraud transmitted to the plaintiffs as genuine documents, representing a real transaction, namely, an actual shipment by T. Brown & Co., of 200 barrels of flour to plaintiffs, when, in fact, they never had shipped a barrel; and, upon being so transmitted, the plaintiffs, in like ignorance of the fraud, and believing such documents represented a *bonâ fide* transaction, accepted and paid the bill. By what process of reasoning can this be said to be a transaction of defendants, or with which defendants are in any way connected in the due course of business? I think, therefore, that Carruthers was, in this transaction between plaintiffs and T. Brown & Co., and to which defendants were no party, acting as and for the firm of T. Brown & Co., to enable that firm to raise money by false and fraudulent means and pretences in their dealings with plaintiffs, and that defendants are in no way responsible for a transaction of such a character, concocted for the benefit of T. Brown & Co., and carried out by Carruthers wholly outside of, and apart from, and contrary to his authority and duty as freight agent of defendants."

There is nothing in the dissenting opinion of Henry, J., with whom concurred another of the judges, that is worth quoting on the subject. The point really involved in the matter, that is, as to how far Carruthers, as the freight agent of the defendants, having authority to sign shipping receipts for goods delivered to the railway for transportation, could bind the defendants, as their agent, by signing receipts for goods not so received, is not discussed by him, and his judgment contains nothing of any value in the consideration of the question really involved in the case. The statute which he discusses does not affect the question in the slightest.

for goods actually received, no express authority being given to him to act otherwise, it is no more within the scope of his employment to fraudulently sign bills of lading for goods not received than it is within the scope of his authority to fraudulently sell the ship, and thereby pass a good title to the purchaser. And in this case the purchaser may not, necessarily, be a party to the fraud, while, in the case of the fraudulent bill of lading, the party receiving it almost necessarily is a party to the fraud. In either case the party committing the fraud is liable to the party injured by the fraud, and as the reliance is (outside of the reliance on the fraudulent shipper and his assignees), but upon his fraudulent statement, made by him without express or implied authority, — the other party (the alleged principal) not acquiescing therein or taking any benefit under it, — we see no tangible reason for holding that other liable for a fraud to which he has been no party, and which he has neither actually nor impliedly authorized. The English cases on the question are in harmony in establishing this doctrine. The American cases differ widely. But we think that the American cases which are not in accord with the view here expressed, are not so because they have lost sight of the special, limited character of the agency, and have, by the application of very broad principles, enlarged the powers of such agents far beyond the scope of their employment. It is one thing to hold a party liable for his own fraud, and quite another to hold a second party liable for such fraud, who has neither expressly nor impliedly authorized its commission; has not acquiesced in it, nor taken any benefit under it; nor has, by any act on his part, empowered the wrong-doer to commit such fraud. That there are cases of agency more or less analogous to these we are considering, where the principals have been held liable for the fraudulent acts of their agents, committed within the scope of their employment, may well be; and yet, in these cases we are more particularly considering, the principals not be liable for fraudulent misrepresentation by their agents of a fact, unauthorized by their principals actually or impliedly, and with which they have not acquiesced, nor derived any benefit therefrom. We examine some of the authorities.

In A. D. 1734, the doctrine was stated, on the authority of Middleton *v.* Fowler,[1] that "the owner of a ship is to be considered a general master, and the master as his servant; a master is not answerable for the acts of his servant, but where he acts in execution of any authority given him by the master."[2] And it was

[1] Salk. 282; Skin. 625.

[2] Boucher *v.* Lawson, Cas. temp. Hardw. 87, *arguendo.*

unanimously decided by the court that the owner was not liable in that case for the act of the shipmaster, where the act of the master was without the authority of the owner, and did not inure to the benefit of the latter. The doctrine laid down by the court is wide enough to cover the very case we are now considering. Thus: "*Owners can never be liable but in respect of the delivery of goods to a ship trading for hire, where the delivery to the master is a delivery to the owners, and where the owners can in respect of such delivery have an action for the freight;* for you must show a benefit accruing to the person against whom you bring your action, or else a special undertaking." Boucher *v.* Lawson (second decision).[1] *A fortiori*, there can be no action against the owner where there is no "special undertaking" by him, where the goods have never been delivered to the master at all. This decision has, apparently, escaped the notice of all the courts, in their consideration of this question in recent times. So, in Middleton *v.* Fowler (A. D. 1696),[2] in holding that the master of a stage-coach was not chargeable for goods lost by the driver, unless the master takes a price for the carriage of the goods, the same doctrine was laid down by Holt, C. J.; "for no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master." The authorities for this holding are almost innumerable.[3]

In Lickbarrow *v.* Mason,[4] Buller, J., intimates that in such a case it is the master who would be liable, implying that there would be no other liability, thus: "An argument was used with respect to the difficulty of determining at what time a bill of lading shall be said to transfer the property, especially in a case where the goods were never sent out of the merchant's warehouse at all. The answer is, that under those circumstances, a bill of lading could not possibly exist, if the transaction were a fair one; for a bill of lading is an acknowledgment by the captain of having received the goods on board his ship. Therefore, *it would be a fraud in the captain* to sign such a bill of lading if he had not received goods on board; and the consignee would be entitled to his action *against the captain* for the fraud." Here it is treated as the fraud of the captain; not that of the shipowners. The case of Osey *v.* Gardner[5] points in the same direction. There A. had some rum in the West India docks, which he sold to B. The rum was to be shipped by A. in a vessel chartered by B.

[1] Cas. temp. Hardw. 194, 200.
[2] Skin. 625; Salk. 282.
[3] See a large number of cases cited in Skinner, 625.
[4] 2 T. R. 63, 75.
[5] Holt, 405.

Before the rum was delivered on board the vessel, B. got a bill of lading from the captain. He then sold the rum to C., who paid B. for it upon an indorsement of the bill of lading. A. being unpaid, and suspecting the solvency of B., took part of the rum forcibly out of the vessel, and countermanded the delivery of the rest. In trover, by C. against A., to recover the rum, the court held that, under the circumstances of the case, the bill of lading transferred no property to the plaintiffs, on the ground that no goods having been on board at the time the captain signed the bill of lading, it was fraudulent.

In an Irish case[1] (A. D. 1834), where a bill of lading was signed before the goods were shipped, it was held that the bill of lading was *fraudulent and void*, and that the assignee under the bill of lading could not maintain trover for the goods, the possession of which had been obtained under an attachment by the vendor of the assignor of the "fraudulent and void" bill of lading.

In Berkeley *v.* Watling,[2] Patteson, J, asked: "Is there any instance of an action by a consignee of a bill of lading before the actual delivery of the goods?" and counsel for the consignee admitted that there was no instance of such an action reported. And Patteson, J., then stated the other alternative: Suppose the consignor had brought the action, how could the bill of lading be conclusive in his favor? The fact would be within his own knowledge. Then, how does the consignee become a party, except by making the consignor his agent? To which it was claimed by counsel for the contesting owner: "*That objection is conclusive; the defendants are sued only as shipowners by the party who puts himself in the place of consignor.*" And in this case it was held that *the consignee*[3] could not recover against the shipowners, under a bill of lading which alleged that goods were shipped, which, in fact, were not shipped, leaving the question open as to the conclusiveness of a bill of lading between a shipowner and an indorsee for value; with the expression of opinion by Littledale, J., that the bill of lading in such case is not conclusive.

In Bates *v.* Todd,[4] it was also held, by Tindal, C. J., that a bill of lading is not conclusive between the shippers of the goods and the owners of the ship; but the owners may show that less goods than specified in the bill of lading were shipped, the master having been misled as to the quantity.

Grant *v.* Norway[5] (A. D. 1851) is the leading English authority on

[1] Begbie *v.* Clarke, Cooke & Alcock, 150.

[2] 7 A. & E. 29, 35.

[3] See Armour *v.* Michigan Central R. R. Co., 65 N. Y. 111, stated *infra*.

[4] 1 Moo. & R. 106.

[5] 10 C. B. 665.

the question. It was there held by the whole court that the master of a ship signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed. Jervis, C. J., in delivering the judgment of the whole court, thus discusses the question: —

"The point presented by the several pleas is substantially one and the same, viz.: whether the master of a ship, signing a bill of lading for goods which have never been shipped, is to be considered as the agent of the owner in that behalf, so as to make the latter responsible. The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship; but is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made. He may take up money in foreign parts, and, under certain circumstances, at home, for necessary disbursements and for repairs, and bind the owners for repayment; but his authority is limited by the necessities of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may pretend that it is. He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So, with regard to goods put on board, he may sign a bill of lading and acknowledge the nature and quality and condition of the goods. Constant usage shows that masters have that general authority; and, if a more limited one is given, a party not informed of it is not affected by such limitation. Is it then usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? for all parties concerned have a right to assume that an agent has authority to do all which is usual. The very nature of a bill of lading shows that it ought not to be signed until goods are on board; for it begins by describing them as *shipped*. It was not contended that such a course is usual. It is not contended that the captain had any real authority to sign bills of lading unless the goods had been shipped; nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not. If, then, from the usage of trade, and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the

authority: and, in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped. It would resemble the case of goods or money taken up by the master under pretence that they were wanted for the ship, when in fact they were not; or a bill of exchange accepted or indorsed *per procuration*, when no such agency existed; Alexander *v.* Mackenzie.[1] The words '*per procuration*' give notice to all persons that the agent is acting under a special and limited authority; and, therefore, the party taking such a bill has to establish the existence of the authority. It is not enough to show that other bills similarly accepted or indorsed have been paid, although such evidence, if the acceptance were general, by an agent in the name of the principal, would be evidence of a general authority to accept in the name of the principal. So, here, the general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board; and a party taking a bill of lading, *either originally or by indorsement*, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it."

We have set out this judgment thus fully: *first*, because it is the leading case on the subject; *secondly*, because we agree with it; and *thirdly*, because it has been violently attacked by at least one authority in this country,[2] with which we do not agree.

In Hubbersty *v.* Ward,[3] the principle of Grant *v.* Norway[4] was followed, and it was held that the master of a vessel has no power to charge his owner by signing bills of lading for a greater quantity of goods than those on board. Pollock, C. B., said: "If the master cannot sign bills of lading for goods not on board, it follows that he cannot sign for a greater quantity than are on board. When once he has signed to the extent of the goods on board, his authority *quoad* those goods is gone." And, in delivering judgment: "We think that, when a captain has signed bills of lading for a cargo that is actually on board his vessel, his power is exhausted. He has no right or power, by signing other bills of lading for goods that are not on board, to charge his owner."

In Coleman *v.* Riches,[5] the same principle was applied to the case of a warehouse receipt, fraudulently signed by the wharfinger's servant. It was there laid down that a master is civilly responsible for the fraud or negligence of his servant acting in the course of his employment, but not for an act of wilful fraud or negligence done by him out of the scope of his authority, or

[1] 6 C. B. 766.
[2] Stated and considered, *infra*.
[3] 8 Ex. 330.
[4] 10 C. B. 665.
[5] 16 C. B. 104.

inconsistent with the course of his employment. Therefore, where A., the servant of a wharfinger, fraudulently signed a receipt purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf, to be shipped to the order of C., no such wheat having, in fact, been delivered, and thereby wilfully induced C. to pay the price thereof to the pretended vendor, it was held that the wharfinger was not liable; although it was proved that C.'s course of dealing was to pay for all wheat delivered for him at the wharf, on the production by the vendor of the wharfinger's receipt, and that the latter knew it. In this case Williams, J., said: "I do not feel at all inclined to dissent from the doctrine in Story on Agency, § 456, where it is laid down that 'the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of his agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use or benefit.' Assuming that to be good law, the question is, whether the act of Board in respect of which responsibility is here sought to be cast on the defendant, was an act done by him in the course or within the scope of his employment. I think we cannot so hold without departing from the decision of this court in Grant *v.* Norway. It is said that that case is distinguishable from the present, because it was put upon the ground of the general understanding of the commercial world. There is no commercial usage or understanding that the fact of goods being put on board shall be treated as an incontrovertible fact merely by reason of the master's having signed a bill of lading. So, here, I see no ground upon which the plaintiff could be justified in assuming as an incontestable truth that the wheat had been delivered by Lewis at the defendant's wharf, because the fact was so stated in the receipt."

The cases of Reynolds *v.* Jex,[1] The Sir Henry Webb,[2] Dewell *v.* Moxon,[3] Walshe *v.* Provan,[4] all show similar limitations on the power of the master to bind the owners, within the strict scope of his employment, in cases where he has had no *express* authority to act otherwise, and where the courts refused to hold he had an *implied* one.

In The Sir Henry Webb,[5] which was decided prior to Grant *v.* Norway,[6] Dr. Lushington laid down principles similar to those which governed the court in deciding the latter case. In The Sir Henry Webb, freight brought into the registry was claimed, *first*, by M. & Co., under a charter-party entered into at Malta, between the master and them, and with the view of securing to

[1] 7 B. & S. 86.
[2] 13 Jur. 639.
[3] 1 Taunt. 391.
[4] 8 Ex. 843.
[5] 13 Jur. 639.
[6] 10 C. B. 665.

them the payment of a debt from the shipowner; *secondly*, by certain mortgagees of the ship, under an assignment of freight by the master for advances on the ship's account; *thirdly*, by the assignees of the owner. It was held that, *first*, the master had no authority to bind his owner by the charter-party; *secondly*, nor to make the assignment of freight; and consequently, *thirdly*, the assignees were entitled to the fund in the registry. In so deciding, Dr. Lushington said: "The first question is, had the master any power to enter into such a charter-party. It is perfectly true that the master is the agent of the owner, for the purpose of enabling him to carry on the trade in which the ship is usually engaged; but it is not competent to the master, or to anybody, to assume to himself any other authority than the indispensable and necessary one of procuring a freight for the vessel, according to the ordinary terms. He has no right whatever to give creditors resident at Malta a prior right of payment, without the authority of his principal. I have, therefore, no hesitation in saying, that I do not consider this charter-party to have been framed under adequate authority, and if the master has exceeded his authority, his act cannot be binding on the owner, and unquestionably not upon the assignees of the owner in this case."

Jessel *v.* Bath[1] is to the same effect. The question came up under the English Bills of Lading Act,[2] which enacts that every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment against *the master or other person signing the same*, notwithstanding that such goods, or some part thereof, may not have been so shipped. The defendants were charterers of a steamship engaged in the Mediterranean trade, and had ship's agents or consignees at the port of call. It is the custom for a ship's agent or consignee to sign bills of lading instead of the master, and no difference is recognized in trade usage between the efficacy of his signature and that of the master. The defendant's agents at Genoa signed a bill of lading for manganese, shipped in bulk and not weighed at the time of shipment, which described the manganese as of a certain weight. The plaintiff was assignee for full value of this bill, and the whole of the manganese was, on the arrival of the ship, delivered to him, but was found to be short of the weight stated in the bill. In an action brought by him to recover damages for non-delivery of the full weight, it was held, that the defendants were not bound by the signature of their agents to a bill of lading for a greater quantity than was actually shipped. Bramwell, B., suc-

[1] L. R. 2 Ex. 267.

[2] 18 & 19 Vic. c. 111, § 3.

cinctly puts the matter thus: "At common law the defendants would not be liable on this bill, because, although Messrs. Barchi were their agents to conduct their business, they were not their agents to make an admission contrary to the fact, by signing a bill of lading for a quantity they knew nothing of. Then, does the statute make any difference? I think not. It seems to me only to mean that the person actually signing the bill of lading shall be liable. If, for instance, an owner had signed, it would be conclusive against him, *but it would not be so against the other owners.* If, then, the bill of lading is only conclusive against the person actually signing, the defendants, not being the signers of the bill in question, are not made liable by the statute." [1]

The main ground upon which it is claimed that the shipowner is liable in such a case is that of estoppel. This question is dealt with in several of the cases which we have cited, and in Cox *v.* Bruce [2] (A. D. 1886) among others. In this case, a bill of lading signed by the captain of a ship in respect of a shipment of bales of jute contained the following provision: "If quality marks are used, they are to be of the same size as the leading marks and contiguous thereto; and if such quality marks are inserted in the shipping notes, and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods." The bill of lading described the bales as marked in proportions specified with different quality marks, indicating different qualities of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged, however, it was found that there had been shipped, in fact, fewer bales marked with one of such quality marks and more marked with another of such marks, indicating an inferior quality, than stated in the bill of lading. It was held, on these facts, that an indorsee of the bill of lading for value, without notice of the incorrectness of the description of the marks therein, had no right of action against the shipowners, either for breach of contract or upon the ground that they were estopped by the representation contained in the bill of lading. Lord Esher, after dealing in this case with the question of contract arising out of the memorandum in the bill of lading, proceeded: "But then, it is said that, because the plaintiffs are indorsees for value of the bill of lading without notice, they have another right, —

[1] Lebeau *v.* General Steam Nav. Co., L. R. 8 C. P. 88; Blanchets *v.* Powell's Llantrioit Collieries Co., L. R. 9 Ex. 74; McLean *v.* Fleming, L. R. 2 Sc. & D. 128; Cox *v.* Bruce, 18 Q. B. Div. 147, the Court of Appeal affirming the judgment of the Queen's Bench Division, are in accord with the previous cases stated.

[2] 18 Q. B. Div. 147, 151.

that they are entitled to rely on a representation made in the bill of lading that the bales bore such and such marks, and that there is consequently an estoppel against the defendants. That raises a question as to the true meaning of the doctrine in Grant *v.* Norway.[1] It is clearly impossible, consistently with that decision, to assert that the mere fact of a statement being made in the bill of lading estops the shipowner, and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the shipowner. The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed. Therefore the doctrine of that case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading, so as to bind his owners, the particular mercantile quality of the goods before they are put on board; as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do."

The same doctrine is established by Brown *v.* Powell Coal Co.,[2] where it was held, that a shipowner is not estopped by the signature of the bill of lading by the master from showing that the goods, or some of them, were never actually put on board. In neither of these judgments, in these different English courts, including the ultimate court of appeal, the House of Lords, is there a single dissenting judgment. In neither of them is Grant *v.* Norway[3] questioned by either counsel or judges; and in several of them, notably in the latest case (A. D. 1886) we have cited,[4] that case is expressly followed. So it is perfectly clear the law in England on the point is thoroughly settled, and, we think, is thoroughly well settled.

[1] 10 C. B. 665.
[2] L. R. 10 C. P. 562.
[3] 10 C. B. 665.
[4] Cox *v.* Bruce, 18 Q. B. Div. 147; decided by the Queen's Bench Division, and affirmed by the Court of Appeal.

In this country, though, the case is decidedly otherwise. The decisions here are in irreconcilable antagonism; the Supreme Court of the United States, and the other Federal courts, and the courts of quite a number of the States where the question has arisen, holding the same doctrine as is established by the unbroken series of English cases; while in New York, and in two or three of the other States, the decisions are *contra* to what we think is really the law in the matter.

The leading case which holds that the owner is liable on the bill of lading of the master, signed by the latter, without any receipt of goods, is Armour *v.* The Michigan Central R. R. Co.[1]

The first thing specially observable in this case is, that the judgment was delivered by a divided court, Earl, C., dissenting from the judgment. And the judgment was in reversal of the unanimous judgment (by Morrell, Curtis, and Sedgwick, JJ.) of the Superior Court of New York. So that there were in this case really four judges on each side of the question. The judgment of the majority of the judges in the final decision proceeds on the assumption that Grant *v.* Norway[2] had been overruled, at least in New York. The language is:[3] "Grant *v.* Norway has been subject to much and severe criticism, as being adverse to the general view prevailing in the courts of this State, where confidence has been reposed in an agent and an apparent authority conferred upon him, that the principal must suffer from an actual exercise of authority not exceeding the appearance of that which is granted. When one of two innocent persons must suffer in such a case, that person must bear the loss who reposed the confidence. So far as Grant *v.* Norway stands in the way of this doctrine, it must be deemed to be overruled. Remarks of Davis, J., in N. Y. & N. H. R. R. Co. *v.* Schuyler."[4]

We find that, while what we think are very unsound principles were laid down in the latter cases to which reference is made in the above, as widely as they are laid down, yet that it was rather sought to *distinguish* Grant *v.* Norway, in those cases, than to *overrule* it. Thus, the remarks of Davis, J., referred to, are as follows: "I shall *not inquire* how far the English cases, and especially the leading case of Norway *v.* Grant,[5] so much relied upon, may be in conflict with the law of this State. Both the Judges Selden have sought to show that Norway *v.* Grant is distinguishable from the cases under their consideration, and I will only add that if they did not succeed in pointing out the distinction, and the case really stands in conflict, *so much the worse for that case.*"[6]

[1] 65 N. Y. 111.
[2] 10 C. B. 665.
[3] At p. 121.
[4] 34 N. Y. 73.
[5] 10 C. B. 665.
[6] The italics are his own.

The cases in which "the Judges Selden" referred to Grant *v.* Norway are The Farmers' and Mechanics' Bank *v.* The Butchers' and Drovers' Bank,[1] and Griswold *v.* Haven.[2] In the latter case, Selden, J., says: "There are some English cases which have been frequently cited in opposition to the doctrine adopted in this case, and which, although briefly commented on in the case of The Butchers' and Drovers' Bank, it may be well again to notice, as a more extended analysis will show, I think, that they are of very little weight as opposed to that doctrine. The first of these cases is that of Grant *v.* Norway.[3] The master of a ship owned by the defendants had signed and delivered a bill of lading, in the usual form, for goods which had never been shipped. The plaintiffs, upon the faith of this bill of lading, and upon its deposit with them, had made advances to the parties appearing by the bill to have shipped the goods. Upon discovering that no goods had been shipped, they brought their action against the owners of the ship. Now, upon the principles maintained here, this was a very plain case. The parties to whom the bill of lading was given had, of course, no right of action, because they were cognizant of the fraud, and the plaintiffs had none, because no representation was made to them. Had the bill of lading been a negotiable instrument, the plaintiffs would have been in precisely the same position as persons who became *bonâ fide indorsers* [*sic.*, but *indorsees* is meant] of the negotiable note of a partnership fraudulently issued by one of the partners. A privity between the parties would then have existed through the negotiable character of the paper, and the defendants would have been estopped by the act of their agent from setting up that no goods had been shipped."

Here, palpably, there is no pretence that Grant *v.* Norway was wrongly decided or was overruled. The case, in fact, in effect admits that Grant *v.* Norway was correctly decided, within the actual limits of the case, and an attempt is made to distinguish it from Griswold *v.* Haven, from which case, on another ground than that named, to which we hereafter refer, we think it is clearly distinguishable. It is also observable that while quotations have been given in Griswold *v.* Haven from observations made during the argument in Grant *v.* Norway, Selden, J., failed to notice that the judgment given by Jervis, C. J., in Grant *v.* Norway, was the unanimous judgment of the court.

The comments on Coleman *v.* Riches,[4] in Griswold *v.* Haven, are equally disingenuous. The soundness of Coleman *v.* Riches

[1] 16 N. Y. 125.
[2] 25 N. Y. 595.
[3] 10 C. B. 665.
[4] 16 C. B. 104.

is not questioned, but, in attempting to distinguish it from Griswold *v.* Haven, the doctrine established by the judgment of all the judges is lost sight of or distorted.

So, in The Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank,[1] the attempt is made to distinguish this case from Grant *v.* Norway and Coleman *v.* Riches, but there is no pretence there that those cases were not properly decided, nor the slightest intimation that either of those cases was being overruled. Selden, J., says of them: "In neither of those cases was the document upon which the question arose negotiable. It was sought there to make the principal responsible for a false representation of the agent, not to the person to whom the representation was made, but to one with whom the agent had no dealings, and to whom he had made no representation. Upon a careful examination, it very plainly, I think, appears that this was the real obstacle to a recovery in each of these cases. When Sergeant Crowder, counsel for the plaintiffs in Grant *v.* Norway, cited the case of Hern *v.* Nichols,[2] and invoked the doctrine there laid down by Lord Holt, Justice Cresswell replied: 'There the factor entered into a contract with the plaintiff for his employer. Here you are a step further off. You say your agent, with whom I made no contract, has enabled a man, with whom I did contract, to cheat me. *This remark presents, in my judgment, the turning-point of the case, and the only obstacle to the plaintiff's recovery.*'"

In this case, as in Griswold *v.* Haven (*supra*), while there is an effort made, by a palpable ignoring of the *judgments* in Grant *v.* Norway and Coleman *v.* Riches, to sustain their holding in the two New York cases named, it is not for a moment claimed that they were actually overruling Grant *v.* Norway or Coleman *v.* Riches. On the contrary, the Judges Selden evidently treated both of these cases as well decided, and their effort seemed to be to show that, in the two New York cases, they were not deciding *contra* to them. Nominally, at least, they did not claim to be overruling them, but rather to be following what they alleged was their actual holding.

But, while trying to escape from the holding of Grant *v.* Norway and Coleman *v.* Riches, on the ground upon which those cases are decided in the judgments, a correct summary of which judgments is to be found in the head-notes of these cases, thus: "The master of a ship signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so

[1] 16 N. Y. 125, 140. [2] 1 Salk. 289.

signed;" and: "And a master is civilly responsible for the fraud or negligence of his servant acting in the course of his employment; but not for an act of wilful fraud or negligence done by him out of the scope of his authority, or inconsistent with the course of his employment," — the court in this very case of Farmers', etc. Bank *v.* Butchers', etc. Bank [1] (relied on in Armour *v.* Michigan Central R. R. Co.,[2] and by Davis, J., in New York, etc., R. R. Co. *v.* Schuyler),[3] assent to a doctrine which, of itself, shows that Armour *v.* Michigan Central, etc. R. R. Co., is wrongly decided; thus: "Here you are a step further off. You say '*your agent, with whom I made no contract, has enabled a man, with whom I did contract, to cheat me.*' This remark presents, in my judgment, the turning-point of the case, and the only obstacle to the plaintiff's recovery, viz.: the want of any privity of contract between the plaintiff and the agent."

The words which we have italicized state the case on that point, not only of Grant *v.* Norway and Coleman *v.* Riches, but of Armour *v.* Michigan Central R. R. Co., as well. In all of these cases the parties making the contract with the agent were the men with whom the plaintiffs, who claimed to be cheated, made their contract. A bill of lading entered into with A., the shipper, to deliver goods to A. or his assigns; or to order or assigns; or to B. or assigns, is equally a contract with A., and, under such contract, the assignee of the indorsee of either of the two first-named bills of lading takes precisely the same rights as the indorsee of B. in the third case named. So that, on the authority invoked in Armour *v.* Michigan Central R. R. Co., the very ground upon which in Farmers', &c. Bank *v.* Butchers', &c. Bank, it is sought to distinguish Grant *v.* Norway and Coleman *v.* Riches, and to sustain them, is conclusive to show that Armour *v.* Michigan Central R. R. Co. is wrongly decided.

The court, in this latter case,[4] did seem to have some misty comprehension of this difficulty, and attempted to get out of it with what it calls a "plausibility." But it is not even that. The merest tyro in law should know that, primarily, the contract is made with the shipper or consignor, and that the consignee has no other or greater rights, because, in the bill of lading, his name is inserted, than a party has where the shipper's name is inserted in the bill of lading as the person to whom the goods are to be delivered, or where no name but simply "order or assigns" is inserted, and the party takes by indorsement of the bill of lading. In either case, the consignee or indorsee claims through the con-

[1] 16 N. Y. 125, 141.
[2] 65 N. Y. 111.
[3] 34 N. Y. 30.
[4] At p. 121 *et seq.*

signor, with whom as shipper the contract for the shipment has been made. So, on the very ground that Grant *v.* Norway was sought to be distinguished, not only in Farmers', &c. Bank *v.* Butchers', &c. Bank,[1] but in Armour *v.* Michigan Central R. R. Co.[2] itself, must this latter case be held to have been badly decided.

An adaptation of the slang in the language of Davis, J., from New York, &c. R. R. Co. *v.* Schuyler,[3] would seem to be more applicable to Armour *v.* Michigan Central R. R. Co. itself, than to what we think is the undoubtedly well decided, as it is the often affirmed, decision of Grant *v.* Norway.

And not only do those older New York cases, in their efforts at distinguishing and thereby sustaining Grant *v.* Norway, show that Armour *v.* Michigan Central R. R. Co. was wrongly decided, because there was no privity between the principal of the agent (who made the fraudulent contract with the alleged shipper) and the defrauded consignee, on the ground that the bill of lading is not negotiable; but on the same ground they distinguish and sustain Grant *v.* Norway, and therefore condemn the holding in Armour *v.* Michigan Central R. R. Co., because there was no representation made by the agent to the party ultimately defrauded. This is very obvious by their comments on Coleman *v.* Riches.[4] In that case it would seem that the agent signed a receipt for goods as received for George Coleman (the plaintiff) at Riches's (the defendant's) wharf. This receipt was produced by the pretended vendor, and he, in the presence of the agent who had signed the receipt, represented to the plaintiff that the wheat had been delivered at the wharf, and was thereupon paid for it by the plaintiff. This is much nearer a representation to the plaintiff, by the fraudulent agent, than in Armour *v.* Michigan Central R. R. Co. The receipt and bill of lading in the two cases seem to have been, in effect, the same. But in the latter case, the representation in the bill of lading was made by the agent to the fraudulent shipper; by him to the bank, and by the bank to the plaintiff. The remarks of Selden, J., in Farmers, &c. Bank *v.* Butchers, &c. Bank,[5] referring to Coleman *v.* Riches, would have a still stronger application to Armour *v.* Michigan Central R. R. Co., thus: "It was sought there to make the principal responsible for a false representation of the agent, not to the person to whom the representation was made [that is, by the receipt], *but to one with whom the agent had no dealings*, and to whom he had made no representations. . . . There Board, the agent of Riches, *had given a false receipt, not to the plaintiff but to Lewis*, and Lewis had

[1] 16 N. Y. at p. 140 *et seq.*
[2] 65 N. Y. at p. 121 *et seq.*
[3] 34 N. Y. at p. 73.
[4] 16 C. B. 104.
[5] At p. 141 *et seq.*, 16 N. Y.

exhibited this receipt to the plaintiff and obtained money upon it. . . . The difficulty in the way of a recovering, in this case, was that no privity of contract was established between Riches, or his agent [Board], and the plaintiffs, by means of which *the misrepresentations made by Board could be considered as made to the plaintiff*. Had the receipt been a negotiable instrument, a privity would have been established." This reasoning is conclusive against the holding in Armour *v.* Michigan Central R. R. Co., as is really shown in the case itself.[1]

But while we think Armour *v.* Michigan Central R. R. Co. is wrongly decided, and that not alone on the ground that the two New York cases (itself one of them) to which we have referred, in their attempts to distinguish Grant *v.* Norway, show that it (Armour *v.* Michigan Central R. R. Co.) is wrongly decided; but also on the clear, unquestionable ground upon which Grant *v.* Norway, and the unbroken series of English cases which followed it, were, as we have shown, really decided; namely, that the acts were not binding on the owner, or principal, as they were acts outside of the scope of the employment of the master or agent, unauthorized, expressly or impliedly, by the owner or principal. It may be that the cases of Farmers', &c. Bank *v.* Butchers', &c. Bank,[2] Griswold *v.* Haven,[3] and New York, &c. R. R. Co. *v.* Schuyler[4] may have been well decided, though not affecting the soundness of the well-decided case of Grant *v.* Norway, or the numerous cases in England and in this country which have followed it, and without affecting the unsoundness of the badly-decided case of Armour *v.* Michigan Central R. R. Co. and the two or three cases in this country which have followed it.

We think that Farmers', &c. Bank *v.* Butchers', &c. Bank[5] and Griswold *v.* Haven[6] are both distinguishable from Grant *v.* Norway and the other English cases we have cited in this section; and that while, in those two American cases, there is language used which is much too wide, to cover all classes and descriptions of agencies, the actual decision in these cases may be sustained without at all interfering with the principles governing that class of agencies covered by Grant *v.* Norway and the other English cases, and without, on any solid ground, sustaining the holding in Armour *v.* Michigan Central R. R. Co.

Griswold *v.* Haven[7] was a case where the representation was

[1] See 65 N. Y. 121, 122. See also, making the same distinction, The Farmers' &c. Bank *v.* The Butchers', &c. Bank, in the Superior Court, 14 N. Y. 623, 633, *per* Denio, C. J.
[2] 14 N. Y. 623; 16 N. Y. 125.
[3] 25 N. Y. 595.
[4] 34 N. Y. 30.
[5] 14 N. Y. 623; 16 N. Y. 125.
[6] 25 N. Y. 595.
[7] *Ibid.*

made by a principal, a member of a partnership firm; and the fraudulent representation made by him in connection with the ordinary business of the firm was held to bind the firm. True, the case is put on the ground of agency, and it is also true that each ostensible member of a firm is the agent of his copartners; but he is an agent with the widest possible powers, because he is not only an agent, but is a principal as well. Whether the case is rightly or wrongly decided, the powers of a principal in a firm, with the widest kind of general agency connected with the business of the firm, are very different from the special, limited powers of a shipmaster, or freight-agent of any other common-carrier than a ship, the law in connection with which has grown up with and is a part of the law merchant. If the signature to the receipt or bill of lading, by one of the members of the firm, were that of a partnership-firm, who, as such, owned the railway or the ship, quite another question might arise than that which was decided by Grant *v.* Norway and the cases following it. A member of the firm who owns the ship has power to bind the firm with respect to the ship very much more widely than the mere master of the ship can do. The master's powers, by a long array of authority, are strictly limited and defined; and it is only by setting aside decisions which have regulated such powers, and, on principle, giving him vastly larger powers than he has ever been held to possess, that a case like Armour *v.* Michigan Central R. R. Co. can be sustained.

So, in the case of Farmers' Bank, &c. *v.* Butchers' Bank, &c.,[1] which was a case of the wrongful certification of a check by the teller of a bank, who was accustomed to, and whose business it was to certify checks, it was held that the bank was bound by its representation. This decision was largely put on the ground of the negotiable character of the check. Thus, Selden, J., says: "A citizen who deals with a corporation, or who takes its negotiable paper, is presumed to know the extent of its corporate power. But when the paper is, upon its face, in all respects such as the corporation has authority to issue, and its only defect consists in some extrinsic fact, such as the purpose or object for which it was issued, to hold that the person taking the paper must inquire as to such extraneous fact, of the existence of which he is in no way apprised, would obviously conflict with *the whole policy of the law in regard to negotiable paper*." [2]

But the law in regard to the liability of a ship or railway, on a bill of lading or freight receipt, signed by the master or freight-agent, fraudulently, without receipt of the goods, has nothing

[1] 16 N. Y. 125. [2] *Ibid.* 129.

whatever to do with what is here referred to as "the law in regard to negotiable paper." A much wider scope is, necessarily, in law, given to one class of agents than to another, and, arising out of this, a distinction has long been established between the powers of general and of special agents to bind their principals.

It may be that the act of a manager or cashier of a bank, or, as in this case, a teller acting as cashier, could be sustained, so as to bind the bank, in connection with the fraudulent issue of negotiable paper, where the act of one clothed with less powers would not be sustained; or, that a principle applicable to the one case would be totally inapplicable to the other. We very gravely question the soundness of the rule laid down in this case, at least when applied to such cases as Grant *v.* Norway and Armour *v.* Michigan Central R. R. Co.

Selden, J., says.[1] "It is, I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it." Taking the rule literally, it simply amounts to nothing; because it is always possible to ascertain whether the act done under the power, compared with the power, is within that power. But the so-called rule has been extended to mean,[2] where the extrinsic fact which constitutes the condition of the authority is peculiarly within the agent's knowledge, *though it may be discovered by inquiry*, it is necessarily represented to exist by the execution of the agent's powers, and such execution of the agent's powers is binding on the principal. It is upon this transparent fallacy that all the New York cases, in this connection, depend.

Thus, a shipmaster, or a railway station agent, has the power to sign a bill of lading or freight receipt on the actual receipt of the goods; and therefore, according to this "rule," he has the power to bind the ship and her owners, or the railway company, by signing a bill of lading or receipt, though he has not received the goods; as his signing the bill of lading or receipt is a representation, by the shipmaster or railway station agent, that he has received the goods.

Again, a shipmaster has the power to sell and convey a title to the ship, when the necessities of the case justify it; therefore,

[1] At p. 135.

[2] See New York, &c. R. R. Co. *v.* Schuyler, 34 N. Y. at p. 69, and the other New York cases there cited.

though it can be ascertained by inquiry that the circumstances of the case did not justify it, as he must be held to have peculiar means of knowledge whether the circumstances of the case did or did not justify the sale, the very fact of his making the sale is conclusive. So, a married woman, deserted by her husband, is clothed with the agency of necessity; and therefore, as it is peculiarly within her knowledge whether the necessity exists, though it can be ascertained by inquiry that there is no such necessity, the very fact that she has made the purchases which she could legally make only if the necessity existed is conclusive upon her husband. A special agent has the power to bind a principal for the purchase of $1000 worth of goods. He has bought the $1000 worth of goods, and although this on inquiry can be ascertained, yet he can go on and buy $10,000 worth of goods, and bind the principal for them, because the fact whether he had bought more than one $1000 worth was peculiarly within his knowledge.

Such a principle, as widely stated as it is, is, we think, arrant nonsense, and it is upon this that Armour *v.* Michigan Central R. R. Co. is made mainly to rest.

We notice that it is not very long since that the New York Court of Appeals itself laid down principles of a very different character. Thus, in Mechanics' Bank *v.* New York, &c. R. R. Co.,[1] by the unanimous judgment of the court (Selden, J., taking no part in it), where Schuyler, who was a director and president of the board of directors of the defendant company, and its transfer agent in the city of New York, charged with the keeping of the transfer-books and with the issuing certificates of ownership of the defendants' stock at that place, had fraudulently issued certificates of stock, the defendants were held not liable though Schuyler had, under certain circumstances peculiarly within his own knowledge, power to issue certificates of stock. Comstock, J., in delivering the *unanimous judgment* of the New York Court of Appeals, said: "Schuyler, as the agent of the company, had no power to issue a certificate for shares of stock, except upon the condition precedent of a transfer on the books by some previous owner, and the surrender of that owner's certificate. He was the transfer agent merely, and his powers were expressly limited to that department of the business of the corporation. He had no general certifying power, nor any power at all to certify, except as incidental to a transfer of stock by its owner to some one else, and as an incidental power it could only be exercised upon the conditions named." And "all the judges, except Selden, J., who took no part in the decision," reversed the judgment of the court below, which held that the defendants were liable.

[1] 13 N. Y. 599.

The question, under a different state of facts, came up again in New York, &c. R. R. Co. *v.* Schuyler,[1] where Davis, J., delivering the judgment of a majority of the same court, differed with the holding of the same court in the previous case, but, as we have shown, on a ground that would destroy very much of the well-established doctrines of the law of agency; a mere majority of the remainder of the court (four out of seven) concurring with him.

From very many instances which might be named, a few of which we have mentioned, where the agency is of a limited special character, we think it is unquestionable that the ground upon which New York, &c. R. R. Co. *v.* Schuyler,[2] and the other New York cases named there, purport to have been decided, viz., "that where the authority of an agent depends upon some fact outside the terms of his power, and which, from its natur[e] rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact, . . . though such fact might be discovered by inquiry," is, as applied in those cases, utterly untenable as an unlimited principle of law, or, in fact, as a principle of law at all.

The very case of New York, &c. R. R. Co. *v.* Schuyler,[3] *per* Davis, J., himself, shows the palpable falseness of the "rule." He there says: "But conceding that the whole question of this case is governed by the law of principal and agent, it becomes of grave significance to ascertain the scope and extent of the powers conferred on the agent. Herein, I think, the case *essentially differs from that of the Mechanics' Bank.*[4] The 'question' of that case is stated by Comstock, J., in 16 N. Y., at pages 154, 155, *with succinctness and accuracy.* He says: 'In *that case the transfer-agent of the defendant's corporation was authorized to sign and issue certificates of stock on a transfer from one shareholder to another upon the books, and on the surrender of the previous certificates.*[5] The agent, for his own purposes, signed and issued certificates to a large amount where there had been no such transfer or surrender. These unauthorized and spurious instruments were in form precisely like those that were genuine and authorized. Trusting to their false appearance, the plaintiffs took one of them by transfer and advanced money upon it, which they recovered in the New York Superior Court. We held that they could not recover, and reversed the judgment, placing our decision prominently upon the ground that the acts of the agent were not within the real or

[1] 34 N. Y. 30.
[2] 34 N. Y. 30, 68, *et seq.*
[3] 34 N. Y. at p. 61.
[4] 3 Kern. (13 N. Y.) 599.
[5] The italics are his own.

apparent scope of the power delegated to him.'" The following additional language was omitted:[1] "We certainly did not put our judgment upon the ground that the plaintiffs were not in privity of dealing with the defendants, by reason of the non-negotiable character of the certificates, and therefore could not sue for the fraud. It had been argued that they were negotiable or *quasi* negotiable. We held that they were not; but we further held that, whatever might be their character in that respect, they were void everywhere, *because issued without authority*."

And yet the agent, Schuyler, had authority, under certain circumstances, to issue the certificates, exactly as a shipmaster or a railway-station or freight agent has to sign bills of lading or freight receipts on the actual receipt of the goods.

Now, in the face of this distinguishing, and not disapproving of the holding in Mechanics' Bank *v.* New York, &c. R. R. Co.,[2] in New York, &c. R. R. Co. *v.* Schuyler,[3] which, in principle, sustains the holding in Grant *v.* Norway, and condemns that in Armour *v.* Michigan Central R. R. Co.,[4] look at the New York "rule" as it was stated by Selden, J., in delivering the judgment of the majority of the court in Farmers', &c. Bank *v.* Butchers', &c. Bank,[5] as quoted from the North River Bank *v.* Aymar:[6] "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde;* the apparent authority is the real authority."

To sustain this "rule," as it was applied in 16 N. Y. 137, and the later New York cases, the cases of Grant *v.* Norway and Coleman *v.* Riches required a good deal of distinguishing.

The "rule," as stated in The North River Bank *v.* Aymar,[7] is much clearer and less mystical than it is as stated in some of the other New York cases which have used it, and, therefore, the palpable absurdity and unsoundness of the "rule," as acted on in these cases, is rendered clearer. The following instances, in addition to others which we have named, make clear the falsity of the "rule," as so construed and applied. Thus a partner has not the power of binding his co-partners by a guarantee given outside of the scope of the business of the firm, unless with the consent of his co-partners. But, according to the "rule," his giving

[1] 16 N. Y. at p. 155.
[2] 13 N. Y. 599.
[3] 34 N. Y. at p. 61.
[4] 65 N. Y. 111.
[5] 16 N. Y. at p. 137.
[6] 3 Hill, 262.
[7] *Ibid.*

a guarantee at all would bind the firm, because his giving a guarantee would be a binding assurance to the party receiving the guarantee that he had the consent of his co-partners. Hence follows the absurdity that while he has no power to give a guarantee to bind his co-partners without their consent, yet he has full power to so bind them without their consent; because his giving the guarantee at all is in itself conclusive that he has their consent.

The simplicity with which the "rule" is stated in 3 Hill, 262, construing it as it has been done in the later New York cases, at once shows its palpable absurdity. But even as somewhat more metaphysically or mystically stated in some of the other cases from which we have quoted it, it is really no better, but, as a distortion of a principle of law, much worse. Thus, as applicable to some of the other statements of the "rule," is the following: A shipmaster can bind a ship where the circumstances justify him in doing so, *and only then*, by a bottomry bond. But as to whether the circumstances do justify him in so binding the ship, lies peculiarly within his own knowledge (by the "rule," in 3 Hill, 262, this is not an essential ingredient, the "rule" there being entirely misconstrued in the later New York cases), although capable of being ascertained by inquiry, yet as the fact of his obtaining the money on a bottomry bond is conclusive that the circumstances do justify him; therefore he may bind the vessel by a bottomry bond, whether the circumstances justify him or not, — the parties dealing with him in good faith not being "bound to inquire into the facts *aliunde*." So, although the shipmaster is not, usually, the agent of the owners of the cargo at all, yet as he becomes agent of necessity, and can sell the goods when the necessity arises, — the burden of showing this being placed on the buyer, — and pass a good title to the cargo, he can always, according to the New York "rule," do this, whether a necessity for it exists or not, because his selling them at all is conclusive that there is a necessity; and the purchaser "is not bound to inquire into the facts *aliunde*."

And, further, outside of the "rule" as stated in 3 Hill, 262, and as it is stated in the other cases, as it is a matter almost without exception that an agent who has a special, limited power, has a particular knowledge whether the act performed is or is not within his power, the rule, in effect, simply amounts to this, that where an agent has the power under any circumstances to perform an act, the very fact that he performs the act is a guarantee to all parties that he has the power to do so, — that the act performed is within his power. And this, mark, according to the "rule," is the guarantee of the principal in all cases, even in such

as the most extreme of those of which we have stated. Clearly it is only necessary fairly to state the alleged rule, as it has been construed by the late New York cases, in order to show its unsoundness and absurdity. There are simply legions of cases to show this, with which the works on Agency abound, and scores of which are cited in Vol. I., Book II., Part VIII., of this work.[1]

The rule, as it is stated in 3 Hill, 262, as subsequently construed and distorted in its unsoundness and absurdity, has scarcely any reasonable limits at all. Thus, if a merchant, having injured his hand so that he cannot write, requests that his name be signed for him by a friend, to a promissory note, that, according to the so construed rule, would bind the merchant by the signature of his friend to ten thousand notes; for, having the power to sign *a note*, the fact of signing ten thousand notes is a guarantee by the merchant, to any one taking either of the notes *bonâ fide*, that that one is the particular note which the friend was requested to sign, — the fact of the friend signing either of the notes, he having the power to sign one of them, being a guarantee that each of the notes is the particular one he had the power to sign; no inquiry being necessary *aliunde*. We repeat, we think the so construed rule is arrant nonsense.

Not only, as we have shown, did the New York Court of Appeals itself, in The Mechanics' Bank *v.* The New York, &c. R. R. Co.,[2] unanimously hold a doctrine contrary to the above-named rule as stated and construed in the later cases, but it would seem from the minute statement by Comstock, J., in 16 N. Y. pp. 153, 154, of The North River Bank *v.* Aymar,[3] that, in this latter case, in the highest court in the State (the Court for the Correction of Errors), the *ratio decidendi* of the Mechanics' Bank *v.* The New York, &c. R. R. Co.,[4] was affirmed by the latter court, which held (an actual reversing of the judgment in The North River Bank *v.* Aymar), in that case, where an agent was authorized by a written power of attorney to sign and indorse notes in the name of his principal, that, as to nine notes that were so signed or indorsed, not in the business of the principal, but for the accommodation of third parties, the plaintiffs, although *bonâ fide* holders of these

[1] See, among other cases, Woodin *v.* Burford, 2 Cr. & M. 391; Wilson *v.* Barthrop, 2 M. & W. 863; Fenn *v.* Harrison, 3 T. R. 757; Polhill *v.* Walter, 4 B. & Ad. 114; Ally *v.* Fernie, 7 M. & W. 154; Davidson *v.* Stanley, 3 Scott, N. R. 49; Harper *v.* Williams, 4 Q. B. 219; Downman *v.* Williams, 7 Q. B. 103; Cooke *v.* Wilson, 1 C. B. N. S. 153; Gillett *v.* Offer, 18 C. B. 905; Green *v.* Kopke, 18 C. B. 549; Parker *v.* Winlow, 7 E. & B. 942, 949; Wake *v.* Harrop, 1 H. & C. 202; 6 H. & N. 768; Oglesby *v.* Yglesias, E. B. & E. 930; Williamson *v.* Barton, 7 H. & N. 899.

[2] 13 N. Y. 599.

[3] 3 Hill, 262.

[4] 13 N. Y. 599.

notes, could not recover on them for want of authority in the agent to sign and indorse them; a very emphatic condemnation by the highest court in the State, in addition to that of the unanimous judgment in the Court of Appeals itself, of the so called and so construed "rule;" the utter unsoundness of which, we think, we have shown. The weak point in it simply is in making the holding out of an agent by his act or declaration, as equivalent to the holding out by the principal, and, in this respect, it is as bad as the reasoning of Ritchie, C. J., in delivering the judgment of the Supreme Court of New Brunswick, in the badly decided case of Jones *v.* Foster.[1]

But, bad as we think the "rule" is in itself, as it was distorted and applied to such a case as that of Armour *v.* The Michigan Central R. R. Co.,[2] we think the application to it of the principles from which it was, as so construed and distorted, deduced, is equally as bad; and that, to such a case, the principles were misunderstood and misapplied.

One of these principles is connected with the doctrine of estoppel. But a man is only estopped *in pais* by his own statement. Therefore, before a principal is estopped by the statement of another, it must be shown that the principal speaks by and through that other, or that the other is speaking as the agent of the principal, within the scope of his power; for outside of this the principal is no more bound by the agent's unauthorized statement than he is by the agent's unauthorized act. Where the statement is not the statement of the principal, the person making the statement, the agent, is the only person estopped. It is but begging the question to assume, as to everything he says with reference to the subject with which he has some power, that necessarily that which is said by the agent is said by the principal. There is no such rule in the law of estoppel, and, therefore, deducing in part the newly manufactured New York Agency "rule" from an assumed rule in the law of estoppel which does not exist, necessarily leads to a fallacy.

There is another point connected with bills of lading, as the law relating to them has been developed by Lickbarrow *v.* Mason,[3] and the other cases which have settled the law as to such instruments, arising out of their not being strictly negotiable paper, which has been entirely and inexcusably lost sight of by the New York courts. If A. ship goods, and consign them to B., or ship goods "to order," and indorse the bill of lading to B., the ship or owner, notwithstanding the bill of lading is so signed by the master, is not liable to the consignee or the indorsee of the bill of lading (who

[1] 12 N. B. R. 607, stated *supra*, Vol. I., p. 487, n. 2.

[2] 65 N. Y. 111.

[3] 2 T. R. 63.

stand, for all purposes, both as to rights and powers, in precisely the same position), if the goods in fact did not belong to A., but to C., and C. has claimed and received them by title paramount; the consignee or indorsee of the bill of lading deriving only the title of the consignor.[1] *A fortiori*, the ship or owner is not liable where no goods have been shipped at all. And yet, if there were an estoppel to bind the ship or owner, certainly it would quite as well exist in the former case as in the latter. The New York decisions are so radically unsound that they are repugnant to sound legal decisions, on salient points, in all directions.

So, too, with reference to the other principle, upon the misapplication of which the so-called "rule" in agency is founded, viz.: that where one of two innocent persons must suffer by the fraud of a third, it must be that one of the two who by his trust and confidence has enabled the third to perpetrate the fraud. But, as we have before intimated, there are limitations in this rule. Thus, where A., pretending that he is B., buys goods from C., and thus obtains possession of them, and sells them to D.; no property passes to D., because none passed to A. And, although it was through the act of C. that A. obtained the goods, and was thus enabled to defraud D., the maxim that where one of two innocent persons must suffer, it must be the one who by his trust and confidence enables A. to commit the fraud, does not apply so as to give any title to D.

A. here is not liable to D., precisely as the shipowner is not liable in the analogous case to the consignee or the indorsee of the bill of lading, for the act of the shipmaster, the owner having neither authorized the act nor represented to the consignee or indorsee that he had done so. A., likewise, is not liable to D., because he never vested any property in B., nor authorized or empowered B. to make any representation or perform any act with respect to the goods to bind A. In all such cases, it is not a question which should suffer as between two innocent men, under the maxim relied on. The trust and confidence, such as it is, is reposed by D. in B.; A., as between B. and D., not being in the matter at all, — not having clothed B. with any authority, nor authorized any act, or made any representation to D., that can in any way act as an estoppel. The same reasoning applies to the case of a false, unauthorized representation by a shipmaster, or railway station agent, or freight agent, or shipping clerk, in signing a bill of lading or freight receipt without receipt of the goods.

[1] See Leake on Con. 1198; Berkeley *v.* Watling, 7 A. & E. 29; Gurney *v.* Behrend, 3 E. & B. 622, 634; Barber *v.* Meyerstein, L. R. 4 H. L. 317, 336; Hutchinson on Carriers, § 129.

The case we have above put is another good illustration of the utter absurdity of the New York "rule." Thus, if B. is C., then he has power from A. to pass the property in the goods. But the very fact that he sells as C. is a conclusive representation binding on A., that he really is C.; therefore, though he has no power to pass the property in the goods, and is only B., and not C. at all; yet, according to the New York "rule," as between A. and D., B. is C., and has power to pass the property in the goods. How so utterly silly a "rule," as it has been construed and acted on, could have deceived and been adopted by successive courts in New York, and remained all these years unexposed till now, is difficult to comprehend. In the same way, with the application of such a "rule," the amount of sound law which would be unsettled is almost incalculable. The rule is no more applicable to the case of a shipmaster signing a bill of lading for goods not received, without actual or implied authority to do so, than, on the very face of the "rule," it is to any other well-established case of special, limited agency; nor is it any more applicable, in principle, to agency than it is to sales, or to any other matter lying in contract. Thus, according to the spurious "rule," if A., under any circumstances, has the power as agent to bind B. by an act, the very fact that he performs the act is a conclusive representation, binding on B., that the act is within the power, though can be ascertained *aliunde* that it is not so. With as much wisdom it might be said, if A. under any circumstances has the power to pass the property in goods, the fact that he purports to do so is conclusive that he does so pass the property in the goods, and though the goods are owned by B., and not by A., B. is concluded by A.'s act, because, under some circumstances — for instance, if A. were the owner — A. could pass the property, and his undertaking to pass the property at all is conclusive that he is the owner, although it could be ascertained *aliunde* that he is not the owner.

As regards the maxim as to one of two innocent persons suffering from the fraud of a third, the case of one advancing money on a fraudulent bill of lading, signed by a shipmaster or railway station-agent without receipt of the goods, is a much stronger case than that which we have put connected with a sale. Here is the double confidence of the defrauded party, *first*, in the original holder of the bill of lading or railway receipt, and *second*, the confidence that the shipmaster or freight agent has really received the goods, for which he has signed the bill of lading or receipt. Hence it is a matter of the party defrauded placing trust or confidence in a wrong-doer or in a succession of them. Where credit is given to one with a special, limited power, the one giving

such credit does so at his peril, and there the maxim or principle which applies is, that, in such a case, if he trusts without inquiry, he trusts to the good faith of the agent, and not to that of the principal.[1]

But, while we think we have shown that the so-called "rule," as construed and distorted, is unsound and is not justified by either of the principles upon which it purports to be based, we have also directed attention to the fact that, even assuming the "rule," as so enlarged, to be correct, still the very ground on which it was sought to distinguish and sustain it, so far as it was assumed not to differ with Grant *v.* Norway and Coleman *v.* Riches, was, that in these latter cases the contract was not made with the defrauded parties, nor the representation made directly to them, while, in the New York cases, it was otherwise; the representation having been made either *directly to the defrauded party*, as it was in Griswold *v.* Haven,[2] and that, not by an agent of the firm, but by one of the principals; or else the contract was with reference to negotiable paper, as in Farmers' &c. Bank *v.* Butchers' &c. Bank,[3] and in New York, &c. R. R. Co. *v.* Schuyler,[4] and therefore, in effect, the representation was made to the holder of the paper. And we have also shown that neither of these features is to be found in connection with Armour *v.* Michigan Central R. R. Co.,[5] but that that case is admitted, by the facts in it, to be outside of the rule, and to come expressly within the rule in Grant *v.* Norway and Coleman *v.* Riches, as stated by the New York cases, including that, as we have shown, of Armour *v.* Michigan Central R. R. Co. itself; and, therefore, on every ground the decision in this latter case is undoubtedly bad.

And we not only think the case badly decided, but we think it is one of the most perniciously decided cases that can be found, and is directly calculated to encourage fraud to an almost indefinite extent. In Armour *v.* Michigan Central R. R. Co.,[6] the case, as we have pointed out, is shown by the express admissions in it to be unsound. Thus, in attempting to distinguish Grant *v.* Norway,[7] it is said: "In that case the bill of lading was issued to a party who knew that the bill of lading was issued by an agent without authority, and it was then transferred to a purchaser acting in good faith. It may, accordingly, be said with plausibility that the representation was not made to the assignee, who simply acquired the title of the fraudulent consignee [*sic*, but

[1] Withington *v.* Herring, 5 Bing. 442; Fenn *v.* Harrison, 3 T. R. 757; Pickering *v.* Busk, 15 East, 38, 43; Schimmelpennich *v.* Bayard, 1 Pet. 264, 290.
[2] 25 N. Y. 595.
[3] 16 N. Y. 125.
[4] 34 N. Y. 30.
[5] 65 N. Y. 111.
[6] 65 N. Y. at p. 121.
[7] 10 C. B. 665.

consignor or shipper is really meant]. It would have resembled the case at bar if the plaintiffs had known of the forgery of Michaels [the shipper] when they took the bills of lading, and had then transferred them to persons paying value and acting in good faith. *The case would then have been governed by the rule that an assignee of a thing in action must abide by the case of him of whom he buys.* Remarks of Selden, J., in Griswold *v.* Haven."[1]

But as the *consignee* of Michaels, in Armour *v.* Michigan Central R. R. Co., was simply the *assignee* of Michaels (the shipper), as we have pointed out, by the express admissions not only in that case, but, as we have shown, in the others which preceded it in the Court of Appeals, and which attempted to distinguish both Grant *v.* Norway and Coleman *v.* Riches on this ground, it is very obvious that, in any case, the decision in Armour *v.* Michigan Central R. R. Co. is, on this ground alone independent of any others, untenable.

But although all that was in New York's highest court (the Court of Appeals), in a later case in a lower court (the Supreme Court of New York) we notice that in a late case, Bank of Batavia *v.* New York, &c. R. R. Co.,[2] while endeavoring, in a similar case, to follow Armour *v.* Michigan Central R. R. Co., seeing the difficulty in the way which we have pointed out, the lower court coolly, on that point, say that the others were wrong, and, claiming that to be true which we have pointed out, they undertake to correct or overrule the decision of the higher court, and to decide that there is no such distinction as was taken in the higher court with reference to Grant *v.* Norway; and therefore, as a necessity, in order to sustain the holding in Bank of Batavia *v.* New York, &c. R. R. Co., they "overrule" the decisions of the higher court, and assume that Grant *v.* Norway was "overruled" in Armour *v.* Michigan Central R. R. Co., when, in fact, in that as in the previous cases, it was specially pointed out that in deciding as they did they were not deciding adversely to Grant *v.* Norway or to Coleman *v.* Riches.

There are two or three cases outside of New York which have followed Armour *v.* Michigan Central R. R. Co.[3] One of these is Savings Bank *v.* Atchison, &c. R. R. Co.[4]

The Kansas case mainly relies, outside of the New York case,

[1] 25 N. Y. 604–606.
[2] 33 Hun, 589, at p. 597.
[3] 65 N. Y. 111.
[4] 20 Kan. 519. There is an important feature in this case which has escaped the notice of the court by which it was decided, that distinguishes it from Armour *v.* Michigan Central R. R. Co., 65 N. Y. 111, and places it without the rule established by Grant *v.* Norway and the numerous English and American cases agreeing with that case, but which it is unnecessary here to take up time and space to consider.

on *dicta* in McNeill *v.* Hill [1] and in Carr *v.* The London & N. W. Ry. Co.[2] But, in the former of these cases, the receipt was given *by the principals themselves*, which, of course, involves quite another question in the law of estoppel than where it is claimed that the owners of a ship or railroad are estopped by the unauthorized and fraudulent misrepresentation of a shipmaster, or railway station-agent, or freight-hand, of the receipt of goods which have never, in fact, been received. The other case relied on is even a less applicable authority for the position taken in the New York case or in the Kansas case.

In Carr *v.* The London & N. W. Ry. Co.,[3] the plaintiff bought goods which were to be consigned to him at Liverpool from St. Helen's by the defendants' railway. On July 7, 1873, the plaintiff received notice from the defendants (*from the defendants themselves*, observe) informing him that *three* parcels of goods had been received by them for his account, and that they held them subject to his order and to the payment of rent and charges. The plaintiff immediately instructed his broker to sell the whole. Early in August the plaintiff received invoices of the three parcels from his vendors, and paid for the whole by an acceptance which was duly honored. The goods were sold on Aug. 21, and the rent and charges on the *three* parcels were paid to the defendants by the broker; but it turned out that *two* parcels only had been delivered to the defendants (the third still remaining on the premises of the vendors), and the plaintiff was obliged to pay to his vendees £5 4*s.* 1*d.*, the difference between the price at which they had bought the third parcel and what they had to pay for other goods. The defendants' servants were aware on July 9 that they never had received the third parcel, but no notice of the mistake was given to the plaintiff until Sept. 1, after the goods had been resold and the charges paid. It was held, in a special action for non-delivery of the third parcel, with a count in trover, that the defendants *were not estopped from showing that the goods had never reached their hands;* and, consequently, they could neither be liable in trover nor for breach of contract in not delivering the goods. There is no more in the holding in this case, nor in the rules as to estoppel laid down by Brett, J., at pp. 316, 317, to sustain such cases as Armour *v.* Michigan Central R. R. Co.,[4] than there is in Grant *v.* Norway, Coleman *v.* Riches, and the unbroken series of English cases which have followed these cases, and which all

[1] Woolw. (U. S. C. C.) 96.
[2] L. R. 10 C. P. 307.
[3] *Ibid.*
[4] 65 N. Y. 111.

the ingenuity of successive New York courts of appeal failed, notwithstanding their efforts, to distinguish or explain away.

Sioux City, &c. R. R. Co. *v.* First National Bank [1] also follows Armour *v.* Michigan Central R. R. Co.,[2] and makes the extraordinary assertion [3] that the matter of estoppel *in pais* "was entirely overlooked in Grant *v.* Norway, and the cases following it." The assertion is simply absurd. The very ground taken in Grant *v.* Norway by the plaintiffs was stated by their counsel [4] in language almost identical with that named by the court in the Nebraska case with reference to estoppel,[5] thus: "The defendants are liable for the act of the master in signing bills of lading importing that goods had been shipped, and thus inducing the plaintiffs to part with their money, which but for his act they would not have done." What is this but an assertion of estoppel?

So,[6] Howard *v.* Tucker [7] was cited to show that the defendants were "*estopped, as against the assignee of the bill,*" from claiming that the goods were not shipped. And [8] they attempted to distinguish the case from Berkeley *v.* Watling,[9] where it was held that Nave (Watling's co-defendant) might produce evidence that the goods were not shipped in fact, *and was not estopped by the bill of lading, supposing such estoppel to exist in general,* inasmuch as the plaintiff could support his issue only by making Watling (the alleged consignor) his agent; and if Watling was so, the plaintiff was cognizant, through him, of the fact;" and hence that, in that case, *there was no estoppel.* And it was on this ground that the New York cases undertook to distinguish Grant *v.* Norway from the cases they were deciding. The whole doctrine of all these well-decided English cases is, that the owner is *not estopped* by the false statement of the shipmaster, because the master has no express or implied power to make such statement to bind the owner; the master's authority being of a special, limited kind, and if he exceeds it, those who rely upon him do so at their peril.

The only other case which we have found, outside of New York, which purports to follow Armour *v.* Michigan Central R. R. Co., is Brooke *v.* New York, &c. R. R. Co.[10] This is another case where a railway shipping agent fraudulently signed a bill of lading, or railway freight receipt, for goods which were not received, and the facts of the case are virtually identical with those in Armour *v.* The Michigan Central R. R. Co. There is, however, this additional feature in the Pennsylvania case. The bill of

[1] 10 Neb. 556.
[2] 65 N. Y. 111.
[3] At p. 564.
[4] At p. 670.
[5] See 10 Neb. at p. 564.
[6] At p. 675.
[7] 1 B. & Ad. 712.
[8] On p. 676.
[9] 7 A. & E. 29.
[10] 108 Pa. 529.

lading or receipt, having been signed in New York, and the action having been brought in Pennsylvania, the court held that the *lex loci contractus* prevailed. This is, of course, as a general principle, correct. But a question might be raised, where two States, as New York and Pennsylvania, are under the same system of law, as the common law, whether the principle would be carried so far as to make a grossly wrong decision in the one State, on a simple point in common law, — which is common to them both, — binding on the other State. We very much doubt whether the rule — which generally applies to a statute or system of law in the place of the contract differing from that in the place of the *forum* — should properly be extended so far.[1] But, assuming that it should be, it is clear that, taking the New York cases as a whole, they show that the newly manufactured New York rule is not applicable where the agent's representation is made, disconnected with negotiable paper, not to the party himself, but to a stranger to the fraud; the party claiming either as consignee or indorsee of a bill of lading (such parties as to rights and powers, independent of statutes, occupying precisely the same position);[2] taking only such rights as the consignor or indorser had. Or, as it is expressly put in Armour *v.* Michigan Central R. R. Co.:[3] "The case would then have been governed by the rule that *an assignee of a thing in action must abide by the case of him of whom he buys.*" This, as well as the position taken by the same court in previous cases, in distinguishing and upholding Grant *v.* Norway, is conclusive to show that the decision on the main point, in Armour *v.* Michigan Central R. R. Co., is not law, even according to the decisions of the New York Court of Appeals itself.

This difficulty, as we have pointed out,[4] was observed in the lower court in New York (the Supreme Court) in Bank of Batavia *v.* New York, &c. R. R. Co.;[5] and they (the inferior court), to get clear of this difficulty, assumed to do that which the Court of Appeals in a succession of cases refused to be considered as doing, namely, to overrule, instead of distinguishing and sustaining, Grant *v.* Norway. So it is clear that, on the very principle on which they claimed to act, in Pennsylvania, as following the law in the *locus contractus*, they should have held exactly the contrary, on the main point with which they had to deal, to that which they did hold.

[1] The United States Supreme Court have frequently, we think correctly, refused to follow the holding of the State courts in a wrong holding at common law; or, as they designate it, "general law."

[2] See Abb. on Shipping, 12th Eng. ed. 274 *et seq.*; 3 Kent's Com. (13th ed.) 207, n. 1.

[3] 65 N. Y. at p. 122.

[4] *Supra*, p. 32.

[5] 33 Hun, at p. 597.

The Pennsylvania court also assumed that the decision was in accordance with the law of Pennsylvania; but we have entirely failed to find any previous case decided in that State which will at all sustain the holding that a shipmaster, or railway shipping clerk, has the power, by fraudulently signing bills of lading or railway receipts for goods never received, to bind the ship and owners, or the railway company, by such a fraudulent act; notwithstanding the special, limited, well-defined power which the shipmaster or shipping clerk possesses.

This is a very different thing from an agent having power to bind his principal within the scope of his employment, notwithstanding the "private instructions" of the principal; which was the case in Adams Express Co. *v.* Schlessinger,[1] which was the solitary Pennsylvania case on which the court relied in their judgment in Brooke *v.* New York, &c. R. R. Co.[2]

The English case relied on in this case (Coventry *v.* Great Eastern Ry. Co.)[3] is also clearly distinguishable. In this English case the defendants were held to be estopped by *their own act.* There is no question of wrong-doing or fraud by an agent, or of an agent acting outside of the scope of his employment, or *of agency at all* involved in the case. The head-note well states the case: "*The defendants received a consignment of wheat and issued a delivery order for it*, which came into the hands of B. Upon this delivery order B. obtained advances from the plaintiffs. Shortly afterwards *the defendants issued a second delivery order* in respect of the same consignment of wheat. The two delivery orders were different, and such as might be reasonably supposed to relate to distinct consignments of wheat. Upon this second delivery order B. obtained further advances from the plaintiffs, who were under the belief that the delivery orders related to distinct consignments of wheat. B. having afterwards become insolvent, it was held, that *the defendants were estopped by their negligence* from showing that the two delivery orders related only to one consignment of wheat, and that they were liable to compensate the plaintiffs for the loss sustained by them through the advances to B." This, we think, is unquestionably sound law, but it has no more to do with the important point raised and decided by Grant *v.* Norway, Coleman *v.* Riches, and the many other English and American cases which have followed and approved these cases, than the noted Tenterden Steeple has to do with Goodwin Sands.

We think that the decision in Armour *v.* Michigan Central R. R. Co.[4] is not only wrong in itself, but that it is calculated, if gener-

[1] 75 Pa. 246.
[2] 108 Pa. 529, 546.
[3] 11 Q. B. Div. 776.
[4] 65 N. Y. 111.

ally deemed to be law, to be so pernicious in its consequences that no trouble should be spared in order that its unsoundness may be clearly and conclusively exposed. If every railway shipping agent, or freight agent at any little railway station, or master of a ship, has power, by fraudulently signing bills of lading or freight receipts, in collusion with other fraudulent parties, to bind the ship and owners, or railway, for goods not received, the effect could not long fail to be most disastrous. It is not strange, therefore, when the judgment of Comstock, J., pointing out in Farmers', &c. Bank *v.* Butchers', &c. Bank[1] how unsound was the distinction which the majority of the court sought to establish with reference to the English cases, was not assented to by the majority of the court, that the legislature of New York should by legislation endeavor, as they did do, by acts passed immediately after that decision (which subsequently culminated, as we have seen, in Armour *v.* Michigan Central R. R. Co.[2]), to neutralize, to some extent, the baleful consequences of the establishment of such principles as those we have been deprecating; rendering it penal for any person to sign bills of lading, receipts or vouchers for goods, where no such goods had been received.[3]

As we have stated, the question in England is conclusively settled. Since the decision in Grant *v.* Norway,[4] that case has been followed, over and over again, by a succession of courts, without any dispute as to the soundness of the decision by counsel, courts, or text-writers there.

In this country, too, the doctrine, conclusively established in England, has received the sanction of the leading law-writers and courts. Thus, in 3 Kent's Com.:[5] "If the master signs a bill of lading for goods not on board, or at least delivered alongside, which, perhaps, is enough, he is not acting within the apparent scope of his authority, and will not make the owners of the ship liable even to an indorsee of the bill for value." So, Professor Parsons:[6] "But the question arises whether if a captain sign bills of lading before the goods are on board, or delivered to some one authorized to receive them, and they are never shipped, the owners of the vessel are estopped from showing this fact in a suit brought against them for non-delivery by *bonâ fide* indorsees of the bill of lading. It is clear that they are not. It is a fraud on the part of the master to sign the bills before the goods are on

[1] 16 N. Y. at p. 145 *et seq.*
[2] 65 N. Y. 111.
[3] New York Acts of 1858, c. 326, amended by Acts of 1859, c. 353. The very fact of the passage of these acts, under the circumstances, goes very far to show that that was declared to be law which was never previously understood to have been so.
[4] 10 C. B. 665.
[5] 13th ed. 207, n. 1.
[6] 1 Mar. Law, 135, n. 2.

board, and an act not within the scope of his authority as master. And the owners therefore are not liable." So, again, by Chief Justice Redfield: "A bill of lading has been held conclusive against the master of a vessel in favor of a consignee, not a party to the contract, but who had advanced money on the faith of its statements as to the amount and condition of the property, and which from the whole instrument and the usages of trade may be regarded as absolute statements from the master's own knowledge; but it is not conclusive against the owners as to property not shipped, the master having no authority in regard to that." And, again: "As a general principle the contract of the master in regard to freight binds the ship and the general owner of the ship, although chartered by another, and the master is acting under the orders of the charterer. But no such implication arises in reference to bills of lading for property not shipped, designed to be instruments of fraud, and they create no lien upon the interest of the general owner although the charterer was the perpetrator of the fraud. And although the charterer is estopped in such case from showing that no property was shipped, that estoppel will not bind the general owner."[1] And Story, in his Contracts,[2] strikes at the very root of the New York decisions: "An agent employed for a special object may use the ordinary means for accomplishing it, and if he make false representations in the due course of such transactions the principal is bound by them. And any fraud or misrepresentation, which would bind the principal, if he made it himself, will equally bind him, if made by his agent within the scope of his authority, and in the course of his business. But fraudulent acts of the agent beyond the scope of his authority, and especially if they be in contravention of his duty and against the rights of his principal, will not be binding upon the principal. Where, therefore, the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which had not been received, the principal was held not to be responsible. So, also, the representations of a professed agent, although they should form a part of the *res gestæ*, *would not be available to prove the fact of his agency or the extent of his authority*, if questioned by his principal, however publicly such declarations should be made."

The very reverse of this sound principle is the basis of the unsound doctrine of the late New York cases. They, in effect, would make the acts of the agent, instead of those of the principal,

[1] 2 Redf. on Railways (6th ed.), 183, 184.

[2] 5th ed. §§ 214, 215.

binding upon the latter. It is the holding out of the principal, not that of the agent, which places the liability on the principal.[1]

The vicious New York "rule," as it finally culminated in the case of Armour *v.* Michigan Central R. R.,[2] involving the disastrous consequences to the great railroad systems of this country to which we have referred, was, very early in its history, stated in rather a mystical or metaphysical manner; then more plainly; until at length it came down in effect to the *simple* (in more senses than one) statement that where an agent has the power to do an act, he has the power to do that act indefinitely; the mere fact of his doing it being a guarantee to all, each time he performs the act, that that is the particular time in which he had the power to do it, and so on *ad infinitum*. Or, where he has the power to do an act only under certain conditions, his performing it at all makes it good, as that is an authorized representation and guarantee to all that the act is done according to or within the condition, even though by inquiry it can be ascertained that such is not the case; the parties acting on such representation by the agent "not being bound to make any inquiries *aliunde*."

We unhesitatingly say, after an exhaustive examination of the question that this "rule," as so developed, is not law, but that it is unmitigated nonsense. In order to sustain such a ridiculous "rule," which is a complete perversion of the proposition as it was at first stated, they had first to explain away such well-decided cases as Grant *v.* Norway, and Coleman *v.* Riches, the *rationale* of which cases stood directly in their way. Then, when it was found that their attempt to explain and distinguish away Grant *v.* Norway and Coleman *v.* Riches had signally failed, the ridiculous perverted "rule" must stand in any event, and if not consistent with well-decided cases which showed its unsoundness and absurdity, then in the slang of the New York Court of Appeal, which had manufactured or developed the spurious "rule," "*So much the worse for those cases!*"

If the "rule" were law, the whole doctrine of agency would be reversed. We have already shown this by numerous instances which exhibit the silliness of the so-called "rule." Take in addition the following extract from the leading work on the question, Story on Agency. Referring to a special agent, Judge Story says:[3] "*If he exceed the special and limited authority conferred on him, the principal is not bound by his acts, but they become mere nullities, so far as he is concerned.*" And, quoting from Smith's Mercantile

[1] See also 2 Daniel on Neg. Ins. § 1733; Hutchinson on Carriers, § 122, to the same effect as the other leading American text-writers from whom we have quoted.

[2] 65 N. Y. 111.

[3] § 126.

Law,[1] to the same effect: "*It is the duty of the party dealing with such an one, to ascertain the extent of his authority; and if he do not he must abide the consequences.*"[2]

Again: "If one, not being a factor, should be authorized to make a sale, and he should violate his private instructions, and deviate from his authority in the sale, the principal would not be bound. In such a case no general authority is presumed, *and he who deals with such an agent deals with him at his own peril.*"[3] And again:[4] "The restrictions of this implied authority of partners to bind the partnership are apparent from what has already been stated. *Each partner is an agent only in and for the business of the firm; and therefore, his acts beyond that business will not bind the firm.*"[5]

But, according to the New York "rule," where an agent has the power to perform an act at all, its mere performance is a representation and guarantee, binding on the principal ("without the necessity of making any inquiry *aliunde*"), that the act has been performed within the power. Hence, though a partner has no power to bind a firm for acts done outside of the business of the firm, yet, as he has power to bind the firm for acts done *bonâ fide* within the business of the firm, and as his every act is a representation and guarantee, binding on his co-partners, that his act is so done within the business of the firm, "though it can be ascertained by inquiry that it is not;" therefore he has power to bind the firm for his acts done outside of the business of the firm. *Ergo*, though he has not power to bind his co-partners for his acts done outside of the business of the firm, yet he has power so to bind them.

[1] 3d ed. p. 108.

[2] And, besides other text-books, citing for these propositions, Fenn *v.* Harrison, 3 T. R. 757; Howard *v.* Braithwaite, 1 Ves. & B. 209, 210; Whitehead *v.* Tuckett, 15 East, 408; Pickering *v.* Busk, 15 East, 38, 43, 44; Munn *v.* Commission Co., 15 Johns. 44; Rossiter *v.* Rossiter, 8 Wend. 494; Andrews *v.* Kneeland, 6 Cow. 354; Waters *v.* Brogden, 1 Y. & Jer. 457; Brown *v.* Trantum, 6 Mill. (La.) 47; Beals *v.* Allen, 18 Johns. 363; Allen *v.* Ogden, 1 Wash. C. C. 174; Woodin *v.* Burford, 2 C. & Mees. 391; Jordan *v.* Norton, 4 M. & W. 155; Sykes *v.* Giles, 5 M. & W. 645; Smith *v.* East India Co., 16 Sim. 76; Ladd *v.* Town of Franklin, 37 Conn. 53; Martin *v.* Farnsworth, 49 N. Y. 555; Cutler *v.* Boyd, 124 Mass. 181; Horner *v.* Sinnott, 119 Mass. 191; Herbert *v.* Kneeland, 32 Vt. 316; Hatch *v.* Taylor, 10 N. H. 538. See also Foster *v.* Essex Bank, 17 Mass. 479; Kerns *v.* Piper, 4 Watts, 222; Wilson *v.* Peverly, 2 N. H. 548; Brown *v.* Purviance, 2 Har. & G. 316; Harris *v.* Nicholas, 5 Munf. 483; Puryer *v.* Thompson, 5 Humph. 397; Campbell *v.* Stairt, 2 Murphy, 389; Armstrong *v.* Cooley, 5 Gilm. 509; Tuller *v.* Voyt, 13 Ill. 277; Southwick *v.* Estis, 7 Cush. 385; McClenaghan *v.* Brock, 5 Rich. (S. C.) 17; Moore *v.* Sanborne, 2 Mich. 519.

[3] Story on Agency, § 131, citing Fenn *v.* Harrison, 3 T. R. 757, 762; 4 T. R. 177; East India Co. *v.* Hensley, 1 Esp. 112; 3 Kent's Com. (4th ed.) 620; Pickering *v.* Busk, 15 East, 38, 43; Gibson *v.* Colt, 7 Johns. 390; Munn *v.* Commission Co., 15 Johns. 44, 54; Rossiter *v.* Rossiter, 8 Wend. 494; Tradesmen's Bank *v.* Astor, 11 Wend. 87; Lobdell *v.* Baker, 1 Met. 193.

[4] At § 125.

[5] Hasleman *v.* Young, 5 A. & E. 833.

By the application of the New York rule, as it now stands, to the unquestioned and unquestionable principles of the law of agency the conclusion is reached, over and over again, that, while an agent has a limited power, he has not a limited power.

Another American writer,[1] while obviously failing to understand the New York "rule" which he quotes,[2] or to appreciate its absurdity, lays down with Story the correct rule in the law of agency, which conclusively *demonstrates* that absurdity; thus: "Evidence of an agent's own statements or admissions is not admissible against his principal for the purpose of establishing, enlarging, or renewing his authority; *nor can his authority be established by showing that he acted as agent, or that he claimed to have the powers which he assumed to exercise.*"[3] "The fact of the agent's authority can neither be established, *nor can its scope or effect be extended or enlarged, by his own statements, representations, or declarations, so as to charge the principal.*"[4] And still more conclusive: "The authority of the special agent being in its nature limited, its scope is *much more easy of determination, and must not be exceeded;* or, as the rule is ordinarily stated, *his authority must be strictly pursued, and if it is not the principal will not be bound.*"[5]

To sustain these simple, clear, well-established rules of the law of agency, which strike at the very root of the absurd, vicious, pernicious New York "rule," some fifty well-decided cases are cited. And in New York itself, when the judges were much abler lawyers than they appear to have been in recent times, the same principle has been made perfectly clear. Thus, in Rossiter *v.* Rossiter,[6] Savage, C. J., in delivering the judgment of the court, says: "The distinction between a general and special agent is well settled; the acts of the former bind the principal, whether in accordance with his instructions or not; *those of the latter do not, unless strictly within his authority.*" And again, in Tradesmen's Bank *v.* Astor:[7] "If a general agent receive particular instructions, which he disregards, his acts as agent are nevertheless binding upon his principals. For instance, he is authorized to sell an article at a particular price, and he sells for less, the sale is good; *but if a special agent were to do so, the sale would be void.*"[8]

That the English cases are entirely antagonistic to the New York "rule," notwithstanding the efforts of the New York Court

[1] Mecham on Agency.
[2] § 717.
[3] § 100.
[4] § 716.
[5] § 288.
[6] 8 Wend. 494, 497.
[7] 11 Wend. 88, 90.
[8] See additional well-decided New York cases stated *infra*.

of Appeals to show otherwise, is well shown by the court in Adams Express Co. *v.* Trego.[1] The court there say, in considering the cognate question as to the liability of a principal under a notice to an agent: "It is true, notice to an agent of facts arising from and growing out of the subject-matter of his agency is constructive notice to the principal. But this rule has no application to the case where the question is, whether the act relied on to bind the principal was done within the limits and scope of the agent's authority or not. If knowledge of the agent could fix liability upon the principal in such case, irrespective of the limit of the former's authority, the cases of Grant *v.* Norway,[2] Hubbersty *v.* Ward,[3] Coleman *v.* Riches,[4] and many other cases to which reference could be made, would have resulted in very different judgments from what they did. In the first two cases named it was held that, though a master of a vessel has a general authority to execute bills of lading for goods shipped, he has no power to charge the owner by signing bills of lading for a greater quantity of goods than those on board, and that a bill of lading so signed would not bind the owner, even in the hands of innocent third parties. And, in the last-named case, where the agent of a wharfinger, whose duty it was to give receipts for goods actually received, gave a receipt for goods which had not been received, the principal was held not to be responsible, even to third parties who had been deceived by the receipt, because it was not within the scope of the agent's authority in the course of his employment to give such a receipt."

We have thus fully shown the unsoundness of the vicious "rule" upon which Armour *v.* Michigan Central R. R. Co.[5] purports to be founded. We have also shown that the whole body of English law is opposed to the holding in that case, and that all the leading text-writers in this country on the subject quote approvingly, and do not for one moment question the soundness of that series of well and ably decided English cases, decided successively in the courts of Common Bench, Queen's Bench, Exchequer, and House of Lords, which in England have conclusively settled the law. Further, we have pointed out that while the "rule" itself, as variously stated in the different late New York cases, is unsound and absurd, the very ground on which it was sought to sustain it, by showing that it was not opposed by well-decided English cases, conclusively settled the unsoundness of Armour *v.* Michigan Central R. R. Co., according to the admission even in that case itself.

[1] 35 Md. 47, 68.
[2] 10 C. B. 665.
[3] 8 Ex. 330.
[4] 29 Eng. L. & Eq. 323.
[5] 65 N. Y. 111.

We now propose showing by the well-decided cases in this country that not only in principle, as we have already shown, but by the overwhelming weight of authority, the law in this country is held to be as in England. In fact until the decision of those cases in New York in recent times there was no more question as to the law in this country than there was in England.

We find that over three-quarters of a century ago, and long before Grant *v.* Norway was decided, virtually the same principle which governs the English cases was recognized by high authority in this country. In Walter *v.* Brewer[1] (A. D. 1814), where the owner went in the ship to attend to the business of the voyage, and to bring home a cargo for himself, and to take no freight for others, and the master clandestinely, and without knowledge of the owner, took certain bales of merchandise on freight, *and signed bills of lading therefor, which were indorsed to the plaintiff* (an innocent third party without notice) for a valuable consideration; on a suit against the owner for the non-delivery of the bales, it was held (Parker, J., afterwards C. J., delivering the judgment) that the owner was not liable, the act, under the circumstances, having been outside the scope of the master's employment.

This is a much stronger case than Grant *v.* Norway or Armour *v.* Michigan Central R. R. Co.; for here the goods for which the master gave the bills of lading were actually shipped on board the vessel, while in the other cases named there was no shipment at all. But the principle is the same in both instances, the master in neither case, by signing bills of lading outside the scope of his employment, having the power to bind the owner even to an innocent consignee or indorsee for value of the bills of lading.

So, in New York, forty years ago, where a master signed a bill of lading purporting to bind the owners, they were held not liable under the circumstances, the act of his signing the bill of lading as he did being not within the scope of his agency.[2] In another New York case (ten years later)[3] the principle of the badly-decided New York case, Armour *v.* Michigan Central R. R. Co.,[4] is even more clearly condemned. It was there held by the whole court — very much in effect as is enacted by the English Bills of Lading Act, 18 & 19 Vic. c. 111, § 3, which is little, if anything, more than an affirmation of the common law on the point — (Robertson, J., delivering the judgment, and the other judges concurring) that while the master was estopped by the bill of lading, and "clearly became liable for non-delivery of the articles alleged to be shipped," yet "*that no recovery could be had in an*

[1] 11 Mass. 99.
[2] Davis *v.* Crane, 4 Sandf. 355.
[3] Byrne *v.* Weeks, 7 Bosw. 372, 379.
[4] 65 N. Y. 111.

action against the owner of the vessel by the shipper for non-delivery of the goods, because they never were shipped; nor by the assignee of the bill of lading, because he could only claim through the shipper."

In such case, the estoppel would work against the master, not against the owner; against the agent, not against the principal. If later New York cases had acted on such sound principles as these, interests of vast importance would not be imperilled, by the fraudulent contrivance of irresponsible parties, as they have been by such an atrocious decision as that in Armour *v.* Michigan Central R. R. Co.[1]

The general principle governing this class of cases is well laid down by that able lawyer, Shaw, C. J., in delivering the judgment of the court in Massey *v.* Beecher,[2] where an agent had a limited power to make purchases, and had exceeded that limit. The point of the case is well stated in the head-note of the case, thus: "The defendant, by an instrument under seal, appointed one Pierce his attorney, for him, and as his agent, to purchase books, paper, and stationery, for the purpose of carrying on business in A., and the same to sell again for his benefit and on his account, etc., with a proviso, 'that said Pierce shall not make purchases, or incur debts, exceeding in amount, at any one time, the sum of $2000.' The plaintiff having sold goods to Pierce, and brought his action thereior against the defendant, it was held, that the plaintiff must show, that the goods were sold under the power to Pierce, as the agent of the defendant, and not upon the personal credit of Pierce; and that, if at the time of the sale by the plaintiff to Pierce, the latter had already exceeded the limit of his power, the plaintiff would not be entitled to recover, by showing that at the time of the purchase Pierce represented that he would not thereby exceed his limit; or by showing that at the time of the sale, the plaintiff had inquired of Pierce as to his agency, and had been informed by him that it was not full, and having no reason to suspect the truth of such declaration, had thereupon sold the goods to Pierce as agent." This strikes at the very root of the pernicious New York "rule."

Shaw, C. J., in delivering the judgment, said: "The precise point is this, whether, if Pierce, through design or mistake, represented to the plaintiff, that when he made the purchase in question, he had not purchased on the credit of his principal to the amount of $2000, when, in truth, his purchases exceeded that sum, the defendant was bound by it. It is unquestionably true, that the statements and representations of an agent, in

[1] 65 N. Y. 111.

[2] 57 Mass. 511, 516.

transacting the business of his principal, within the scope of his authority, are as binding on his principal as any other acts done within the scope of his authority; they are *res gestæ*, and are acts. But an agent cannot enlarge his authority any more by his declarations than by his other acts; and the rule is clear, that the acts of an agent not within the scope of his authority do not bind the principal. It is often said, indeed, that one is bound by the acts of a general agent, though done against his instructions. This is because the acts are within the scope of his authority; and the violation of his instructions, in the execution of such authority, is a matter solely between himself and his principal, which cannot affect a stranger dealing with him without express notice. *The argument is, that the defendant ought to be bound, because Pierce was his agent, and he, by his letter of attorney, had put it in his power to make such purchase.*[1] This, it appears to us, assumes the very point to be proved. The plaintiff knew that the agent was limited to $2000. He knew, therefore, that if he had purchased to that amount, his power, by its own limitation, was at an end. *If it were otherwise, a power to purchase to the amount of* $2000 *would operate as a power to purchase to an unlimited amount.*[2] But it is urged, that, upon this construction, no one could safely deal with the agent. This objection, we think, is answered by the consideration, that no one is bound to deal with the agent. Whoever does so is admonished of the extent and limitation of the agent's authority, *and must at his own peril ascertain the fact upon which alone the authority to bind the constituent depends.* Upon an authority so peculiar and limited, it is not to be presumed that one would deal with the agent who had not full confidence in his honesty and veracity, and in the accuracy of his books and accounts. *To this extent the seller of the goods trusts the agent, and if he is deceived by him, he has no right to complain of the principal. It is he, himself, and not the principal, who trusts the agent beyond the expressed limits of the power; and, therefore, the maxim that where one of two innocent persons must suffer, he who reposed confidence in the wrong-doer must bear the loss, operates in favor of the constituent, and not in favor of the seller of the goods.*"[3]

This clear and thoroughly accurate exposition of the law, which is supported literally by hundreds of well-decided cases in Eng-

[1] This, in effect, is the doctrine of Armour *v.* Michigan Central R. R. Co., 65 N. Y. 111, and is even more extremely stated in that utterly foundationless New York "rule" upon which Armour *v.* Michigan Central R. R. Co. is made to rest.

[2] Exactly as we have put it, *supra*, in showing the utter absurdity of the New York "rule."

[3] Parsons *v.* Armor, 3 Pet. 413; Stainer *v.* Tysen, 3 Hill (N. Y.), 279; Attwood *v.* Munnings, 7 B. & C. 278, are cited by the Massachusetts Court.

land and in this country, shows clearly the fallacy of the New York agency "rule," and the unsoundness of Armour *v.* Michigan Central R. R. Co.,[1] and the two or three cases outside of New York which have followed it.

The same principle is laid down in a later Massachusetts case, Stollewerck *v.* Thacher,[2] Gray, C. J., delivering the unanimous judgment of the court; thus: "The numerous cases cited at the bar differ in their circumstances rather than in the statement of principles. A bill of lading, even when in terms running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances. If the bill of lading is once assigned or indorsed generally by the original holder, upon or with a view to a sale of the property, any subsequent transfer thereof to a *bonâ fide* purchaser may indeed give him a good title as against the original owner. But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal.[3] In the present case, Baker, being a special agent authorized to deliver the bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, could not bind his principals by a delivery made without such payment. To hold otherwise would be to allow a person intrusted with goods merely for the purpose of collecting the price and then delivering them, to sell them on credit. *The authority of Baker, being special and limited, could not be enlarged by his own declarations.*"

But not only is Armour *v.* Michigan Central R. R.,[4] and the "rule" on which that case is founded, opposed to sound principle, but, as we have shown, that case is opposed, in principle, by the unbroken series of decisions in the English courts, not beginning, by any means, with Grant *v.* Norway,[5] but running back to the very earliest decided English cases. We have also shown that the decisions in the English courts have been relied on by all the leading text-writers on the subject, not only in England, but in

[1] 65 N. Y. 111.
[2] 115 Mass. 224, 226.
[3] National Bay *v.* Dearborn, 115 Mass. 219; Gurney *v.* Behrend, 3 E. & B. 622, 632; Peace *v.* Gloahec, L. R. 1 P. C. 219, 228.
[4] 65 N. Y. 111.
[5] 10 C. B. 625.

this country; not one of whom has questioned the soundness of those cases, nor disapproved of the doctrine which they have established. We now proceed to show, in addition to what, in that direction, we have already done, that the whole weight of judicial decision in this country sustains the doctrine as laid down by the English decisions and by the English and American text-writers.

The leading case in this country is in the court of highest authority in the United States, and therefore is entitled to the greatest credit everywhere as to what is the law in this country. Particularly is it entitled to such credit in this country itself.

In the Schooner Freeman *v.* Buckingham[1] (A. D. 1855), the question came up where the libellants were *the consignees* named in the bill of lading, as the plaintiffs were (where that fact was so much relied on) in the case of Armour *v.* Michigan Central R. R. Co.[2] We state the case in the Supreme Court of the United States very fully, the judgment in which was delivered by Judge Curtis, as the unanimous judgment of the court. The appellees filed their bill in the District Court, alleging that they were the consignees named in two bills of lading, signed by the master of the schooner Freeman, which certified that certain quantities of flour had been shipped on board the schooner by S. Holmes & Co., at Cleveland, in the State of Ohio, to be carried to Buffalo, in the State of New York, and there safely delivered to an agent named in the bills of lading, to be by him forwarded to the libellants, in the city of New York. The libellants, on receipt of the bills of lading, and on the faith of them, made advances to the alleged shippers. The flour not having been received, the vessel was libelled. It appeared that the flour mentioned in the bills of lading as having been shipped by S. Holmes & Co. never was, in fact, shipped, nor, so far as appeared, had the alleged shippers any such flour; but they induced the master to sign the bills of lading by fraud and imposition, intending to use them, as they did use them, as instruments to impose on the libellants, and to obtain advances on the faith of them. Holmes was the special owner, or the owner *pro hac vice*, of the vessel; the claimant was the general owner.

The law in the matter is admirably stated by Judge Curtis, thus: "To state succinctly the legal relations of these parties, it may be said that the claimant was the general owner of the vessel; that Holmes was owner *pro hac vice;* that the libellants are holders of the bills of lading, for a valuable consideration, parted with, in good faith, on the credit of the bills of lading; but that the bills of lading themselves are not real contracts of affreightment, but only false pretences of such contracts; and the question is, whether

[1] 18 How. 182. [2] 65 N. Y. 111.

they can operate, under the maritime law, to create a lien, binding the interest of the claimant in the vessel. Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it. In this case there was no cargo to which the ship could be bound, and there was no contract made for the performance of which the ship could stand as security. But the real question is, whether, in favor of a *bonâ fide* holder of such bills of lading procured from the master by the fraud of an owner *pro hac vice*, the general owner is estopped to show the truth, as undoubtedly the special owner would be. This question does not appear to have been made in the court below, the distinction between the special and general owner not having been insisted on. So large a part of the carrying trade of this country is carried on in vessels of which the masters, or other persons, are owners *pro hac vice*, and the practice of taking security by way of mortgage of vessels has become so common, while, at the same time, the confidence placed in bills of lading as the representatives of property is so great and so important to commerce, that the relative rights of the holders of such documents, and of the general owners and mortgagees of vessels, which are involved in this case, are subjects of magnitude; and the case has received the attentive consideration of the court. The master who signed them was not his agent, and they created no contract between him and the consignor or consignee, or any third person who might become their holder.[1] And it has been laid down by the High Court of Admiralty in England[2] that 'in all causes of action which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. *The liability of the ship, and the responsibility of the owners in such cases, are convertible terms; the ship is not liable if the owners are not responsible; and, vice versa, no responsibility can attach on the owners if the ship is exempt and not liable to be proceeded against.*'[3] Though this language is broad enough to cover all cases, whether of contract or tort, it should be observed that the case before the court was one of wilful tort by the master,

[1] Abbott on Shipping, 42, 57, and notes.

[2] The Druid, 1 W. Rob. 399.

[3] See also The Bold Buccleugh, 2 Eng. L. & Eq. 537; s. c. 7 Moo. P. C. 267; 3 W. Rob. 220.

and that there was no occasion to advert to any distinction between a general and special owner, or to consider whether the interest of the former in the vessel could be bound by the act of the latter, or of the master appointed by him. *We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner.* In the case of the Phœbe,[1] Judge Ware has traced the power of the master to bind the vessel by contracts of affreightment to the maritime usages of the Middle Ages. So far as respects such contracts made by the master in the usual course of the employment of the vessel, and entered into with a party who has no notice of any restriction upon that apparent authority, those maritime usages may safely be considered to make part of our law, though we should hesitate to declare that their effect has not been modified by our own commercial law, which has recognized interests and rights unknown to the commercial world when those usages obtained. And we desire to be understood as not intending to say that all contracts made by a master within the usual scope of his employment, which, by the ancient maritime law, would have created liens on the vessels, will now do so, in such manner as to bind the interests in the vessel of parties whom he does not represent as agent; for the ground on which we rest the authority of a master, who is either special owner or agent of the special owner, is, that when the general owner intrusts the special owner with the entire control and employment of the ship, it is a just and reasonable implication of law that the general owner assents to the creation of liens binding upon his interest in the vessel, as security for the performance of contracts of affreightment made in the course of the lawful employment of the vessel. The general owner must be taken to know that the purpose for which the vessel is hired, when not employed to carry cargo belonging to the hirer, is to carry cargo of third persons; and that bills of lading, or charter-parties, must, in the invariable regular course of that business, be made, for the performance of which the law confers a lien on the vessel. He should be considered as contemplating and consenting that what is uniformly done may be done effectually; and he should not be allowed to say that he did not expect, or agree, that third persons, who have shipped merchandise and taken bills of lading therefor, would thereby acquire a lien on the vessel which he has placed under

[1] 1 Ware, 263.

the control of another, for the very purpose of enabling him to make such contracts to which the law attaches the lien." [1]

And then follows this admirable exposition of the law, in opposition to the principles of the New York "rule" as to agency, and to the express decision thereunder in Armour *v.* Michigan Central R. R. Co.: [2] —

"But if this be the ground upon which the interest of the general owner is subjected to liens, by the act of those who are not so his agents as to bind him personally, this ground wholly fails in the case at bar. There can be no implication that the general owner consented that false pretences of contract, having the semblance of bills of lading, should be created as instruments of fraud; or that, if so created, they should in any manner affect him or his property. They do not grow out of any employment of the vessel; and there is as little privity or connection between him or his vessel and such simulated bills of lading, as there would be between him and any other fraud or forgery which the master or special owner might commit. Nor can the general owner be estopped from showing the real character of the transaction, by the fact that the libellants advanced money on the faith of the bills of lading; because this change in the libellant's condition was not induced by the act of the claimant or of any one acting within the scope of an authority which the claimant had conferred. Even if the master had been appointed by the claimant, a wilful fraud committed by him on a third person, by signing false bills of lading, would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is because the bill is signed by one not in privity with the owner. *But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading.* We say the apparent authority, because any secret instructions by the owner inconsistent with the authority with which the master appears to be clothed, would not affect third persons. *But the master of a vessel has no more an apparent unlimited authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship, when, in case of disaster, his power of sale arises. But the author-*

[1] See The Cassius, 2 Story, 93; Webb *v.* Pierce, 1 Curt. 107.

[2] 65 N. Y. 111.

ity, in each case, arises out of, and depends upon, a particular state of facts. It is not an unlimited authority in the one case more than in the other; and his act, in either case, does not bind the owner, even in favor of an innocent purchaser, if the facts upon which his power depended did not exist; and it is incumbent upon those who are about to change their condition, upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

And this clear, able, and accurate exposition of the law had been made in the most authoritative court in this country — the Supreme Court of the United States — before Armour *v.* Michigan Central R. R. Co.,[1] and the two or three other cases outside of New York following it, were decided; and yet these cases were decided as they were decided! To say nothing of the long and unbroken series of English cases, the absolute unanimity of all the English, and virtually all the American writers, on the subject, one would have thought that so admirable and truthful an exposition of the law as is contained in The Schooner Freeman *v.* Buckingham,[2] would have prevented such a result. And the wonder still might be how such a thing could have happened if it were not for the still greater wonder that a "rule," as now existing and acted on, absolutely monstrous in its absurdity, on which those cases depend, had been formulated in the New York Court of Appeals, and had been acted upon over and over again with as positive an assumption of its correctness as though it were as undoubted as a conclusively demonstrated mathematical proposition, and yet the absurdity of the so-called rule has escaped exposure all these years until now!

The same principle as to the limited power of the master to bind the ship and owners by a false bill of lading which governed The Schooner Freeman *v.* Buckingham,[3] was acted upon in the same court, unanimously, nearly three-quarters of a century ago, in Gracie *v.* Palmer,[4] when such men as Chief Justice Marshall and Judge Story were members of the court. So, over fifty years ago, in the United States District Court for Maine, it was held in The Phœbe,[5] that if the shipper proceeds against the vessel for the fault of the master, in not executing a contract entered into by a bill of lading, the owner may contradict the bill of lading by parol testimony, he being a stranger to the contract and intervening as a third person for his own interest.

In Vandewater *v.* Mills,[6] where the judgment is again unanimous, the United States Supreme Court again lays down the law,

[1] 65 N. Y. 111.
[2] 18 How. 182.
[3] *Ibid.*
[4] 8 Wheat. 605.
[5] 1 Ware, 263.
[6] 19 How. 82, 90.

thus: "The duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time stipulated in the bill of lading or charter-party, without injury or deterioration. *If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board.*"

The same question came up in this country, in admiralty, in the case of Martell *v.* The Schooner Rose and her Master[1] (A. D. 1865). The libel was filed to recover damages for the non-performance of a bill of lading. The bill of lading was executed by Rose, at Alexandria, Va., by which he acknowledged the shipment on the vessel by H., of 3000 bushels of wheat, and 1000 bushels of corn, and which was to be delivered at New York to the shipper or his assigns. The libellants alleged that they advanced on this bill of lading the sum of $4200, and it was assigned to them, and that on the arrival of the vessel at New York, they demanded the wheat and corn, but the vessel failed to deliver more than 150 bushels of wheat and 1000 bushels of corn; and they demanded judgment for the value of the cargo not delivered, against the vessel and the master, whom they alleged to be one of the owners. The other owners defended the action, setting up and proving that the bill of lading was false and fraudulent, and that the wheat mentioned in it was never shipped on board the vessel, except the 150 bushels which was delivered. The court held that as the master had executed the bill of lading with knowledge that the wheat was not on board at the time, the bill of lading was nugatory and fraudulent, as to the vessel and all the co-owners except the master and his ownership. The court, in so holding, said: "A cardinal restriction which applies to this case, is that a master cannot subject a ship *in rem*, much less his co-owners, to a responsibility for safe carriage or delivery of cargo not actually laden on board of it for transportation in the lawful employment of the vessel. *This principle is too firmly rooted in the doctrines of commercial jurisprudence to be now subject to question in this country or in England.*"

The same doctrine was sustained in the United States Circuit Court for the Southern District of New York, in the case of The Loon.[2] By the fraud of the shipper, the master, having no knowledge of the quantity of cargo on board the vessel, was induced to sign bills of lading for lumber, for about double the quantity that was shipped; the libellants being named in the bills of lading as the consignees. With these fraudulent bills of lading, the shipper obtained from the consignees several thou-

[1] 1 Int. Rev. Rec. 125.

[2] 7 Blatchf. 244.

sands of dollars in faith of the bills of lading. On the arrival of the vessel at her destination at New York, it was discovered that only about half the quantity of lumber was shipped that was mentioned in the bills of lading. The consignees having filed their libel against the vessel to charge her with the deficiency, the court held that the master of the vessel had no authority from the owner, either express or implied, to sign bills of lading for cargo not shipped; that the master has no power, by signing bills of lading for goods not on board, to charge the owner, and the result followed, that if the owner was not charged, neither was the ship, and, therefore, that no lien existed to be enforced in admiralty.

The same doctrine was also held in the United States District Court, in The L. J. Farwell.[1] In so deciding, the court said: "The act of the master in signing and delivering the bills of lading in question, when there was no wheat on board the vessel, was unauthorized and irregular. A bill of lading is a contract by which the master engages to carry and deliver goods to the consignee, or to the order of the shipper. It acknowledges the goods to be on board, and they should be on board before the bill is signed. If, therefore, a master signs bills of lading before the goods are on board, or delivered to some one authorized to receive them, and they are never shipped, as the act of the master is not within the scope of his authority, the owners of the vessel are not estopped from showing the facts in a suit brought against them for non-delivery, by a *bonâ fide* indorsee of the bill of lading. In such case the owners are not liable." [2]

The doctrine was again affirmed by the Supreme Court of the United States in The Lady Franklin,[3] where the court did not consider the question even arguable. Judge Davis, in delivering the unanimous judgment of the court, said: "In this case the bill of lading acknowledges the receipt of so much flour and is *primâ facie* evidence of the fact. It is, however, not conclusive on the point, but may be contradicted by oral testimony. The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of a master, *has been so often discussed and so long settled*, that it would be useless labor to restate it, or the principles which lie at its foundation. The case of the Schooner Freeman *v.* Buckingham,[4] decided by this court, is decisive of this case. It is true the bill of lading there was obtained fraudulently, while here it was given by mistake; but the principle is the same, and

[1] 8 Biss. 61, 64.

[2] To the same effect are The J. W. Brown, 1 Biss. 76; The Joseph Grant, 1 Biss. 193; and Sutton *v.* Kettell, 1 Sprague, 309.

[3] 8 Wall. 325.

[4] 18 How. 192.

the court held in that case there could be no lien, notwithstanding the bill of lading. The court say, 'There was no cargo to which the ship could be bound, and there was no contract for the performance of which the ship could stand as security.'"

This was re-affirmed in The Delaware,[1] again by the unanimous judgment of the court. It is there laid down that "Bills of lading, when signed by the master, duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master, but it is *well-settled law* that the owners are not liable, if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent."

In Pollard *v.* Vinton[2] (A. D. 1881), the decision in The Schooner Freeman *v.* Buckingham[3] was again expressly affirmed by the Supreme Court of the United States. The head-note of the case by Miller, J.,[4] who delivered the unanimous judgment of the court, is, —

"Neither the master of a vessel nor the shipping agents of steamboats on the rivers of the interior, at points where they receive and deliver cargo, have authority to bind the vessel or its owners by giving a bill of lading for goods or cargo not received for shipment. Such a bill of lading, being outside of the power conferred by the agent's authority, is void in the hands of a person, who may have afterwards, in good faith, taken it and advanced money on it."

In reaching this conclusion, the law is ably and conclusively discussed by Miller, J., and the limited character and powers of the agent in such cases well shown. In dealing with the New York cases on which Armour *v.* Michigan Central R. R. Co.[5] rests, the United States Supreme Court thus distinguishes them: —

"Whatever may be the true rule which characterizes actions of *officers of a corporation who are placed in control as the governing force of the corporation*, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of *mere agency*, and depends solely on the power confided to the agent. In the other case *the officer is the corporation* for many purposes. Certainly a corporation can be charged with

[1] 14 Wall. 579, 602.
[2] 105 U. S. 7.
[3] 18 How. 182.
[4] See 105 U. S., xxvi. 998.
[5] 65 N. Y. 111.

no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the actions of its official. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation, or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts."

In the same year (A. D. 1881), the question came up in the Circuit Court for the Western District of Tennessee in Robinson *v.* Memphis & Charleston R. R. Co.,[1] of which the following is the head-note: —

"The freight agent of a railroad company, by the procurement of a cotton buyer, signed a bill of lading for thirty-two bales of cotton which were not in hand, and were never delivered to the railroad company or any agent for it. The plaintiffs paid a draft for the price of the cotton on the faith of the bill of lading attached to it and indorsed to them, and, never having received the cotton, sued the railway company for its non-delivery. Held, that the carrier was not estopped to show that no cotton was in fact delivered for transportation; that the agent had no authority, real or apparent, to sign a receipt or bill of lading until actual delivery of the cotton, and the company was not liable."[2]

[1] 9 Fed. Rep. 129.

[2] The whole judgment is a most valuable one. We make the following extracts from it: "The most plausible argument in favor of the plaintiffs is that the carrier, having authorized an agent to sign bills of lading, is estopped to deny the receipt of the cotton when the bill of lading has passed into the hands of an innocent party, and should be held precisely as if it had received the cotton and failed to deliver it to the plaintiffs. I doubt whether a factor and his principal occupy such a relation to each other in their dealings as will justify either in saying of their common or mutual carrier that he is the carrier for the other, so as to take the case out of the category of one between the original parties, where there is not the least doubt that the carrier is not estopped to explain his receipt by showing it to be a false one, or only partially a true one. The Lady Franklin, 8 Wall. 325. But, passing that question, there can be no doubt that one should not be estopped by the conduct of another unless that other is acting for him in the premises. Big. Estop. 429, 442; Whart. Ag. 127–139; 13 Am. Law Reg. N. s. 657; Planters' Bank *v.* Merritt, 7 Heisk. 177; Merchants' Bank *v.* State Bank, 10 Wall. at p. 675. It is sometimes said that the principal is estopped where the agent acts within the *apparent* scope of his authority, and this may be conceded here. But this railroad company did not authorize this agent to sign false or fictitious bills of lading. It said to the community: We are engaged in carrying merchandise to New York or elsewhere over our lines, and we place this man here to receive such as you have for transportation, and authorize him to give you a receipt for it, and a written contract stipulating for its transportation. They did no more than this, and no more can be fairly inferred from what they did. It was not within the apparent scope of this authority to sign and issue documents for the mere purpose of having them attached to drafts, or otherwise pledged as collateral security, irrespective of the actual possession of goods to be carried. It may well be doubted whether the directory itself, or the body of the stockholders even, could authorize the company to issue bills of lading without the merchandise in hand to be used for any purpose. The charter does not authorize such a business, and the company is not engaged in it. Therefore it seems to me plain that the agent's authority, actual and apparent, was limited to issuing bills of lading on goods in hand, and all else was outside the agency,

In a still later case (Dec. 31, 1883), the same principle was acted upon again, in the case of the Querini Stamphalia,[1] in the District Court for the Southern District of New York.

In addition to all of these cases decided in the Federal courts we find quite a number of cases where the law is similarly correctly decided in the courts in different States of the Union.

We have already directed attention to cases in New York itself, prior to the decision of Armour *v.* Michigan Central R. R. Co.[2] In Pennsylvania too, in Warden *v.* Greer[3] (A. D. 1837), in an

unless we are to treat these documents as against the carrier, just as if they were as negotiable in this respect as bills and notes, which we have seen we are not authorized to do. Indeed, a bill of lading is not necessary at all, and the carrier's liability is fixed by delivery of the goods without it. Fox *v.* Hall, 36 Conn. 558; Shelton *v.* Merchants' Co., 4 J. & S. (N. Y.) 527; Hutch. Car. §§ 118, 729. A general railroad agent may sometimes bind the company within the general scope of its own powers, but not a mere station agent, freight receiver, or conductor. 'Atlantic, &c. R. R. *v.* Reisner, 18 Kan. 458; Whart. Ag. § 222 *et seq.*; Cox *v.* Midland Ry. Co., 3 Ex. 268." Again (at p. 138): "The master of a ship has a more comprehensive agency than a station or freight agent of a railroad, and he has no authority, actual or apparent, to issue bills of lading until the goods are delivered to him or the ship, and it took a statute in England to make him even personally liable to one injured by such bill of lading. 3 Kent (12th ed.), 207, and note; 1 Pars. Mar. Law, 135, 137; 1 Pars. Ship. & Ad. 187, 190; 2 Dan. Neg. Insts. §§ 1729, 1733; 1 Chit. Con. (11th ed.) 7; Hutch. Car. §§ 122, 123, 124; 2 Jac. Fish. Dig. 1654, and cases cited by these authorities; 18 & 19 Vic. c. 111, § 3; Jessel *v.* Bath, L. R. 2 Ex. 267; Brown *v.* Powell Col. Co., L. R. 10 C. P. 562; Grant *v.* Norway, 10 C. B. 665. These authorities establish beyond dispute that where a master signs a bill of lading for goods not received, or for more than are received, he acts beyond his authority, and the owner is not liable either to the original shipper or any assignee of the bill of lading, whether he makes advances on the faith of it or gives value for it or not; neither is the owner estopped to show the facts as they really exist. Some courts have reluctantly yielded to this principle, and some have sought to restrict or qualify it in the supposed interest of commercial dealing; but in England, although a statute makes the individual signing the bill of lading liable, it goes no further, and the doctrine of Grant *v.* Norway, 10 C. B. 665, has withstood the assaults upon it, and is established law. It has been approved by the Supreme Court of the United States, and directly or in principle by other Federal courts. Schooner Freeman *v.* Buckingham, 18 How. 182; Vandewater *v.* Mills, 19 How. 90; The Lady Franklin, 8 Wall. 325; The Keokuk, 9 Wall. 517, 519; Buckley *v.* Naumkeag Co., 24 How. 386, 392; The Loon, 7 Blatchf. 244; The Grant, 1 Biss. 193; The May Flower, 3 Ware, 300; The Edwin, 1 Sprague, 477; The Leonidas, 1 Olc. 12; The Marengo, 6 McLean, 487; McCready *v.* Holmes, 6 Am. Law Reg. 229; The Brown, 1 Biss. 76; The Wellington, *Ib.* 279; The Tuskor, 1 Sprague, 71; Sutton *v.* Kettle, *Ib.* 309; Blag *v.* Insurance Co., 3 Wash. 5; Dixon *v.* Railroad Co., 4 Biss. 137, 147, n.; Bradstreet *v.* Heran, 2 Blatchf. 116; Relyea *v.* Rolling Mill Co., 42 Conn. 579. . . . And in respect to the intimations that there is a different rule between an assignee who has in good faith advanced money on the faith of the bill of lading and the original parties, I can only say that, in my judgment, no such distinction exists. These intimations are all founded on doubts and conflicts that were set at rest by Grant *v.* Norway, which is a direct authority against them. The Schooner Freeman case, approving that of Grant *v.* Norway, was itself a case of advancement of money on the faith of a false bill of lading, and must bind us here, both in its principle and its precedent. Besides, I have no doubt, for the reasons I have stated, that it is the correct principle, and it is a mistake to suppose that the interests of commerce require that the common carriers of the country shall become the insurers or guarantors of merchants who choose to make, in their dealings with each other, a convenience of their bills of lading."

[1] 19 Fed. Rep. 123, 125.

[2] 65 N. Y. 111.

[3] 6 Watts, 424.

action against a common carrier by a consignee for not delivering goods in good order, it was held that the owners would not be permitted to give evidence to contradict the bill of lading signed by the master, unless it be to prove that a fraud or imposition was practised on the master, or that there had been a mistake of the consignor and master.

In Massachusetts, in Sears *v.* Wingate,[1] the law is well laid down by Hoar, J., in delivering the unanimous judgment of the court, as covered by the following propositions: *First.* The receipt in the bill of lading is open to explanation between the master and the shipper of the goods. *Secondly.* The master is estopped, as against a consignee who is not a party to the contract, and as against an assignee of the bill of lading, when either has taken it for a valuable consideration upon the faith of the acknowledgments which it contains, to deny the truth of the statements to which he has given credit by his signature, so far as those statements relate to matters which are, or ought to be, within his knowledge. With regard to goods put on board, the master may sign the bill of lading, and acknowledge the nature, quality, and condition of the goods; and as this is within the scope of his agency, it follows that his declarations in the bill of lading respecting these matters estop the owners to the same extent that they would the master. Therefore, *thirdly*, when the master is acting within the limits of his authority, the owners are estopped in like manner with him; but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually received on board.

This case cites Tindall *v.* Taylor,[2] where Lord Campbell says: "According to Thomson *v.* Dominy,[3] an action of contract on the bill of lading could not have been maintained by the indorsee of the bill of lading; but in respect of his property in the goods he might have maintained an action against the master for detaining or converting them, and *the master would be estopped* from denying that he had the goods, after the declaration in the bill of lading, on the faith of which the indorsee had bought and paid for them."

In Maine, in Witzler *v.* Collins,[4] the law is thus correctly stated: —

"In the bill of lading the goods are described as 'shipped,' and under that description it covers and binds the defendants for no goods except such as are on the vessel or wharf, or such as shall be so delivered as and for the goods so embraced in the bill

[1] 85 Mass. 103, 107.
[2] 4 E. & B. 219, 229.
[3] 14 M. & W. 403.
[4] 70 Me. 1 p. 298.

of lading and before the vessel sails.[1] The liabilities of these defendants, if any, are as owners of the steamer and in no other way. The same contract that would bind them for the safe carriage of the goods would also bind the vessel. . . . The action is against the defendants as owners of the boat. The goods were received by one employed for that purpose. So far as appears, he had no authority other than that usually attached to such a position, certainly no more than the master ordinarily has; and that, as already seen, is sufficient only to bind the owners when exercised in the ordinary course of business and in relation to goods delivered on board, or into the actual possession of the master at the wharf."

So, in Ohio, where the action was by the consignees against the owners, it was held, in Dean *v.* King,[2] unanimously by the court, that the owners were not liable. In so deciding, the court thus state the law: "The execution of the bill of lading by the chief clerk of the boat, which purported to cover the twenty bales in dispute, being admitted, and it being conceded that they were not delivered to the consignees as per bill of lading, a *primâ facie* case was made for the plaintiffs below. Then as to the matters of defence: 1. Was it competent for the defendants to show, by parol testimony, that the cotton in controversy had not been received by the boat, and thus contradict the terms of the bill of lading? Certainly it was, and for two reasons: *first*, in so far as the bill of lading was a mere receipt for freight, it was clearly subject to explanation by parol testimony. 4 Ohio, 334; 28 N. Y. 598; 5 Seld. 531; Abb. Adm. 196.[3] And, *secondly*, officers of a vessel engaged in the business of a common carrier have no presumed authority to issue bills of lading for freight not on board the vessel, or not delivered to some one authorized to receive freight. And if the bill of lading be issued without authority, the owners are not bound thereby. 18 How. 191; 7 Blatch. 246; 18 Eng. L. & Eq. 551: 3 Allen, 107; 2 Ex. 274; 8 Ex. 333; 11 Mass. 99; 10 C. B. 687. Nor is there anything in the facts of this case, which, under the doctrine of *estoppel in pais*, precluded the defendants below from showing that the goods in question had not been shipped on their boat, as stated in the bill of lading, or from denying their liability for not delivering them to the consignee."

And see Second National Bank *v.* Walbridge,[4] where the action was against the warehouseman by the assignee of a warehouse

[1] Rowley *v.* Bigelow, 12 Pick. 314, 315; The Delaware, 14 Wall. 600, 601.
[2] 22 Ohio, 118, 136.
[3] See also The Bank of Rochester *v.* Jones, 4 N. Y. 497, in the Court of Appeals.
[4] 19 Ohio, 419.

receipt, which had been issued by the warehouseman by mistake, and it was held, as is correctly stated in the head-note of the case, "That, there being no privity of contract between the defendant as maker and the plaintiff as assignee of the receipt, the defendant, in the absence of all fraud, is not estopped from showing as against the plaintiff the mistake in the giving of the receipt, as a defence to the action."

This case is distinguished [1] from the New York case of Griswold *v.* Haven,[2] on the ground that, in that case, the estoppel was held to arise on the false representation of Wright, one of the defendants, that the grain mentioned in the receipts was in store and in good order; the representation having been made directly to and relied on by the plaintiff in making the advances. The court adds: "That this was the ground of the estoppel enforced in that case is apparent from the comments made upon the cases of Grant *v.* Norway,[3] and Coleman *v.* Riches,[4] and from page 607 of the report, where Selden, J., in delivering the judgment of the court, says: 'I have no hesitation, therefore, in holding that, under the circumstances of this case, the defendants were bound by the representations of Wright. *I mean the verbal representations; not the representations contained in the receipt.*' "

There being no statute in Ohio affecting the rights of the parties, the court held that, as against the assignee of the receipt, the warehouseman was not estopped from showing a mistake in its issue.

The doctrine of these cases met with the clear approval of the court in Louisiana. There, in Fellows *v.* Powell,[5] the law is thus succinctly stated: "The master of the boat acted through his clerk, as the agent of the owners, and whether they are bound by the bill of lading depends on the question whether the master had authority to bind the owners for the delivery of the cotton, before it was actually delivered to him. It has been held, both in England and in this country, that the master of a ship or other vessel has no general authority, as such, to sign a bill of lading for goods which are not put on board the vessel; and that for the want of such authority, the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board.[6] This doctrine meets with our approval; and its application to this case defeats the plaintiff's action."

The doctrine is put here on this broad ground, as, under the

[1] At p. 426.
[2] 25 N. Y. 596.
[3] 10 C. B. 665.
[4] 29 Eng. L. & Eq. 323.
[5] 16 La. An. 316.
[6] See Grant *v.* Norway, 2 Eng. L. & Eq. 337; Buckingham *v.* Freeman, 18 How. 188.

facts of the case, the objection of want of privity of contract, as far as the master had power within the scope of his employment to bind the owners, had no application.

Similar limitations on the power of the master to bind his owners by signing bills of lading are sustained in Rhode Island, where, in Nichols *v.* De Wolf,[1] such limitations are shown to exist.

The question came up directly, too, in North Carolina in connection with a bill of lading or railway receipt, which had been fraudulently obtained from the local station agent of a railway company by the consignor, who had it filled up with the plaintiffs' names as consignees; who, on the faith of and reposing confidence in the bill of lading, accepted and paid the consignor's draft for the cotton alleged to have been shipped, and which was covered by the bill of lading. So the facts, in effect, were identical with those in Armour *v.* Michigan Central R. R. Co,[2] and the decision is in harmony with the English cases, and with the well-decided cases in the Federal courts of the United States, and in the courts of nearly all of the States in the Union in which the question has arisen.

The head-note of the case, which correctly states the holding of the case, is: "A common carrier is not bound by a bill of lading issued by its agent unless the goods be actually received for shipment; and the principal is not estopped thereby from showing, by parol, that no goods were in fact received, although the bill has been transferred to a *bonâ fide* holder for value." [3]

The law is similarly settled in Missouri. There, in Louisiana National Bank *v.* Laveille,[4] the question is put categorically: "Are the owners of a boat rendered liable at the suit of a third party in consequence of a bill of lading having been issued for goods as shipped on board that boat by one apparently having authority therefor, to the consignor named in such bill of lading, who negotiates a bill of exchange drawn on the consignee to such third party, who purchases, and has indorsed to him for value the bill of exchange, on the faith and on the security of the bill of lading, which is also transferred to him, without any knowledge or notice of lack of authority on the part of him who signed the bill of lading, or that the goods recited in the bill of lading were never shipped?" And the court, in answering this question in the negative, as they do unanimously, affirming the judgment of the court below, after an examination of the authorities, conclude: —

[1] 1 R. I. 277.
[2] 65 N. Y. 111.
[3] Williams *v.* The Wilmington & Weldon R. R. Co., 93 N. C. 42, 45.
[4] 52 Mo. 380.

"It will thus be seen from the above-cited authorities that the interrogatory propounded at the outset must meet with a reply in the negative. It is a well-settled maxim in admiralty jurisprudence that 'freight is the mother of wages,' and under the circumstances detailed in evidence here, so far as charging the owners of the boat is concerned, the actual delivery of the goods on board occupies towards the bill of lading for those goods the same maternal relation. It would seem that there is an element of hardship in this case, but it is a hardship which readily could have been avoided had those precautionary measures and inquiries which the law enjoins upon those about to purchase these *quasi* negotiable instruments, or bills of exchange secured thereby, been pursued."

The last case to which we shall refer in this connection is a case in Maryland (The Baltimore & Ohio R. R. Co. *v.* Wilkins),[1] where again the court are unanimous in holding that a carrier is not liable on a fraudulent bill of lading signed by the shipmaster or station agent without the receipt of the goods. In this case, as in the Supreme Court of Canada case,[2] the fraudulent alleged consignor was himself the station agent of the railway, and the consignee, in faith and reliance on the bill of lading, accepted and paid the alleged shipper's draft. In a very able judgment the court, in holding that neither a railroad company nor a shipowner could be made liable in such a case, said: "The liability in either case must depend on the question of the authority of the master or agent to bind his principal by such acts. And, as we have seen, it has been conclusively settled that no such authority exists, and that every one taking such instruments, or making advances on the faith of them, must be regarded as having notice of this want of authority, and acts at his own risk, and on the responsibility of the master or agent alone for damages, as to the truthfulness of the statements appearing on the face of such documents, that the specified goods have been shipped or received at the depot for transportation."

And again: "But even under the doctrine upon which the appellees' counsel rely, that 'if one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who puts confidence in the deceiver should be the loser rather than a stranger,' we do not clearly see how the appellees are strangers to this transaction, or how it can be said the company more than they put confidence in the deceiver, for whilst the deceiver was the company's agent, he was also the appellees' consignor with whom they had been doing business. If as agent he deceived the

[1] 44 Md. 11.

[2] Erb *v.* The Great Western Ry. Co., 5 S. C. of Can. R. 179.

company, as their consignor with whom they were dealing he equally deceived the appellees; and if they relied on him as an honest and trustworthy consignor and business correspondent and dealer, and were deceived, as they undoubtedly were by him, how can it be consonant with reason and justice for them to shift their loss arising from such confidence and trust, upon those who were equally deceived by the same party?"

In this case the court directs attention to Thompson *v.* Dominy,[1] where Alderson, B., says: "This is another instance of the confusion, as Lord Ellenborough in Waring *v.* Cox[2] expresses it, which 'has arisen from similitudinary reasoning upon this subject.' Because in Lickbarrow *v.* Mason[3] a bill of lading was held to be negotiable, it has been contended that that instrument possesses all the properties of a bill of exchange; but it would lead to absurdity to carry the doctrine to that length. The word 'negotiable' was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only."

With the same "similitudinary reasoning" it was sought in the Maryland case by the counsel for the appellees to make the defendants liable for the unauthorized act of the station agent, because in Tome *v.* Parkersburg Branch R. R. Co.[4] it had been determined that the corporation was responsible for the acts of its treasurer and transfer agent, who surreptitiously and fraudulently issued for his own benefit false and forged certificates of stock of the company, and passed them off upon the commer[illegible] public, who advanced money on pledges of them, and received, treated, and acted upon them as genuine. But the court in Baltimore & Ohio R. R. Co. *v.* Wilkins[5] thus disposed of this contention: "This treasurer and transfer agent was made by the company the custodian of the ledger and other books relating exclusively to the ownership and transfer of its capital stock; he was authorized to prepare and countersign all certificates of stock to be issued, and to affix the company's seal, which was intrusted to his keeping and placed in his office, to all such certificates when signed by the president; he was, in fact, constituted the executive officer of the corporation with large discretionary powers, and was held out by the company to the public as the proper party from whom information as to the ownership of its stock was to be ascertained, and, in fact, as *the source* of information on that subject. In this way the public were by the acts of the

[1] 14 M. & W. 403, 408.
[2] 1 Camp. 370.
[3] 2 T. R. 75.
[4] 39 Md. 36.
[5] 44 Md. 11, 27.

corporation 'exposed to the risks of fraudulent devices most dangerous because most difficult to detect.' The authority of such an officer, both real and apparent, differs widely in its extent and scope from that of a mere station agent. The instruments issued in those cases are also of an entirely different character from those issued in this case. The distinction between them has been well stated in the brief of the appellant's counsel. Stock in corporations is intangible property. Stock certificates are not promises to do anything with particular articles of property, but simply statements of ownership of shares or interests in property. It is the peculiar province of the treasurer and transfer agent, whom the company authorizes to give and make such statements, to make known to the commercial public dealing with the stock the facts of such ownership and to whom the shares belong. But a bill of lading performs a very different function. It evidences and is a contract for the transportation of goods, and is not an instrument intended to give information as to the ownership of intangible property. The agent who signs it is not held out to the public as authorized to make statements like those in a certificate of stock, but only to make contracts to carry visible and tangible property. The property which is thus stipulated to be carried being visible and tangible, the fact whether it has been shipped or received at the depot for shipment or not can be determined and easily determined in a multitude of ways without applying to the agent. To the general doctrines on which our decision in these *stock cases* was based there is, and must be, the exception of the recognized and well-settled principles of commercial law in reference to bills of lading, which we have stated, and which governs the present case."

It was the same "similitudinary reasoning" that was condemned in this case, and by Lord Ellenborough in Waring *v.* Cox,[1] that has led in New York to the adoption of an utterly unsound general "rule," which, as applied in that State, and as culminating in the radically incorrect decision in Armour *v.* Michigan Central R. R. Co.,[2] is destructive of a very large part of the law of principal and agent; and in that State, and in all other States which have adopted that "rule," must necessarily leave the whole matter of the law as to principal and agent utterly at sea.

Having now shown, as we have sought to do, that not only is the whole solid body of law in England on the subject opposed to the holding of Armour *v.* Michigan Central R. R. Co.,[3] and to the

[1] 1 Camp. 370.
[2] 65 N. Y. 111.
[3] 65 N. Y. 111.

two or three cases outside of New York which have followed it, but that the law in this country, on principle and the overwhelming weight of authority, is in harmony with the well-established law of England as to the non-liability of a shipowner or other common carrier on the bill of lading or freight receipt, signed by the shipmaster or the freight agent or shipping clerk of a railway, without a receipt of the goods, we give a little further consideration to the fallacious "rule" on which Armour *v.* Michigan Central R. R. Co.[1] was decided.

The first thing specially noticeable in connection with it is, that it originally came into existence, not as the decision of any court of authority, or, in fact, of any court at all, nor even as the statement of a principle deduced by any respectable jurist, but was simply the invention of contesting counsel in the case of North River Bank *v.* Aymar,[2] where we find it first formulated. The majority of the court there, being caught by its phraseology, adopted it, and largely rested upon it, in their decision of the case.

It is next observable that the decision in that case was that of a divided court, Cowen and Bronson, JJ., being the majority, while Nelson, C. J., dissented, with whom also agreed the judge in the court below, — the Superior Court of New York. So, at that stage, there were two judges on each side. The case was then taken to the New York Court of Errors, *where the judgment was reversed*.[3]

So, as a mere matter of authority, neither the rule, as it has since been construed, distorted, and acted on, nor the case, can be considered as of any weight.

The various forms which the "rule" has assumed from the time it was first formulated by the ultimately unsuccessful counsel in North River Bank *v.* Aymar[4] (A. D. 1842) down to the time it was used in Bank of Batavia *v.* New York, &c. R. R. Co.[5] (A. D. 1884) is rather striking. As it originally appeared, under "the ingenuity of counsel," it was as follows: —

"*Whenever the very act of the agent is authorized by the terms of the power, — that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, — such act is binding on the constituent as to all persons dealing in good faith with the agent.* Such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority."

[1] 65 N. Y. 111.
[2] 3 Hill, 262, 270.
[3] See the facts as to this stated in Mechanics' Bank *v.* New York, &c. R. R. Co., 13 N. Y. 632, 633; Farmers' &c. Bank *v.* Butchers', &c. Bank, 16 N. Y. 153, 154.
[4] 3 Hill, 262, 270.
[5] 33 Hun, 589, 598.

Denio, C. J., in Farmers', &c. Bank *v.* Butchers', &c. Bank,[1] thus states it: —

"Where an agent is authorized to bind a principal by the making, acceptance, or indorsement of negotiable paper, and he makes, accepts, or indorses a note or bill *in such a form as apparently to be within his power, and so that, by comparing the power with the act alleged to be done in pursuance of it, the latter appears to be authorized*, and the security is negotiated to an innocent party, who parts with value, without notice that there has been any abuse of the authority, the principal is bound, though it be shown that the paper was given in a case or for a purpose to which the authority did not extend."

In the later case of Farmers', &c. Bank *v.* Butchers', &c. Bank,[2] the "rule" undergoes another change. It is there: "Where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, *and which cannot be ascertained by a comparison of the power with the act done under it.*"

In Griswold *v.* Haven[3] the "rule has undergone a wonderful transformation. As stated there, it is: "Where the authority of an agent depends upon some fact outside the terms of his power, and which from its nature rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact."

This statement of the counsel's "rule" in North River Bank *v.* Aymar,[4] radically varied as it was, is adopted in New York, &c. R. R. Co. *v.* Schuyler,[5] with the additional feature added, that the extrinsic fact which constitutes the condition of the authority is necessarily represented to exist by the agent's act, though by inquiry it might be discovered that the act was not within his power.

In Armour *v.* Michigan Central R. R. Co.[6] this radical variation from the rule as it was originally formulated by counsel and adopted by the mere majority of the court in the subsequently overruled case of North River Bank *v.* Aymar,[7] with a little further variation, is acted on; and the principal, it is there stated, must suffer from an actual exercise of authority by the agent "not exceeding the appearance of what is granted."

[1] 14 N. Y. 323, 633.
[2] 16 N. Y. 125, 135.
[3] 25 N. Y. 595, 602.
[4] 3 Hill, 262, 270.
[5] 34 N. Y. 30, 68, 69.
[6] 65 N. Y. 111, 121.
[7] 3 Hill, 262.

Coming down still later, in Bank of Batavia *v.* New York, &c. R. R. Co.[1] the application of this shifting and distorted "rule" is thus put: "The authority of the agent in this case was general, to receive property for shipment and transportation, and issue to the shipper bills of lading like that in question. *The exercise of this power of issuing the bill depended upon the fact dehors the power, the receipt of the property;*[2] and that fact, whether or not the goods had been received, rested particularly within his personal knowledge. And his statement in this respect, though false, made in such due manner and form, charged the defendant in behalf of the plaintiff, who legitimately and in good faith made the advances in reliance upon it as true."

Notice now, in the history of the "rule," the following facts: It was formulated by counsel, unsustained by any authority, in 1842, when, in reversal of the judgment of the New York Superior Court, it was adopted by a mere majority of the Supreme Court, — but two judges to one; thus showing two judges on each side of the question. The case was then reversed by the Court of Errors; and the rule, as far as it was acted on in the case, was thus condemned by the highest court of the State; after which it seems to have remained in abeyance for fourteen years, when it was resuscitated by a majority of the Supreme Court of the State, although it had previously, in the same year, as it has since been construed and acted on, been disapproved and condemned by the unanimous judgment of the same court.

The effect of the late statements of the rule amounts to this: "If an agent under any circumstances has the power to perform an act, then his performing the act at all is binding, — his performing the act at all being conclusive on the principal that the act has been done in accordance with the power, though it has not been, and though it can be ascertained on inquiry that it has not been."

But the rule, as originally stated and relied on, was not at all to this effect. It was: "Whenever the very act of the agent is authorized by the terms of the power, — that is, whenever by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used, — such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde*. The apparent *authority* is the real authority."

This, really, amounts to very little more than saying, "If an agent has the power he has the power;" that is, "*whenever the*

[1] 33 Hun, 589, 598.

[2] This is not correct. The receipt of the property is a part of the power.

very act of the agent is authorized by the terms of the power," then the act is binding, or, as still further explained, "whenever *by comparing the act done by the agent with the words of the power, the act is itself warranted by such terms used*," the act is binding.

In the cases in 65 N. Y. and 33 Hun, the cases do not come within this self-evident proposition, as it is formulated. The "very act of the agent authorized by the terms of the power" of a shipmaster, is to sign bills of lading for goods actually received; just as "the terms of the power" of the master to sell the ship, or to sell a stranger's cargo, are that such power can be exercised only when the necessities of the case demand it; and the mere signing of the bills is no more justified by him, nor any more binding on the owner, when the "very act is not within the terms of the power," than it is in the case of the sale of the ship or cargo.

So, again, "whenever, by comparing the act done by the agent with the words of the power, the act is itself warranted by such terms used," the act is binding. The act of a master under "the words of the power . . . is itself warranted by such terms used," only when a bill of lading is signed on receipt of the goods. By the very "words of the power" he is *not* "warranted by such terms used," in signing a bill of lading without having received the goods, any more than he is warranted in selling the ship or cargo where no necessity for such sale exists, when the very terms of his power do not warrant him in selling without the existence of such necessity.

All that would seem, then, to be left of the rule, would be that *when the very act of the agent has really been performed by him within the very terms of his power*, such act, having been so performed within the terms of the power, is, as to third parties, binding on the principal; such third parties not being bound to inquire into facts without the power (*aliunde*); the apparent authority being the real authority.

Fairly coming within this statement would be this, which itself carries the rule into very doubtful territory: Where an agent has power conferred on him to perform an act, and the act is performed in accordance with the terms of his power, the act is binding on the principal, though it might have been ascertained by inquiry, that, as to some matter *aliunde*, the performance of the power had been for some other purpose than that which the principal intended. Thus, a shipmaster having power to sign bills of lading only on receipt of the goods, if, having received the goods, he has signed the bill of lading, that would be binding on the

owner, though, — the shipper being no party to the fraud, — his purpose, when he signed the bill of lading, was to fraudulently make away with the goods. The shipper would not be affected by that; he being no party to the act, and the master's act in signing the bill of lading on receipt of the goods being "within the very terms of his power," — within the very scope of his employment.

"The apparent authority is the real authority." True! The apparent authority and the real authority are alike, that the shipmaster has the power to sign bills of lading on receipt of the goods, and not otherwise; and whenever his act comes within this apparent and real authority, then the act is binding on the principal. Otherwise, it is not.

"The apparent authority is the real authority," and, therefore, the holding out of one as an agent to perform an act is as binding on the principal as to third parties, to whom the alleged agent is so held out as having power to perform the act, as though he really possessed the power. This is all that is meant, even according to their own showing, by the court, in the overruled case of North River Bank *v.* Aymar;[1] and by Lord Ellenborough, in Pickering *v.* Busk,[2] whom they quote to sustain the counsel's rule, thus: "I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject-matter; and there would be no safety in mercantile transactions, if he could not."

The authority with which the broker was there apparently clothed was to sell a quantity of hemp. The authority with which a shipmaster is apparently clothed is to sign bills of lading on receipt of the goods. If a broker has been held out by the principal as having authority to sell hemp, his apparent authority by such holding out is his real authority. So, if one is held out as having the power to sign bills of lading on receipt of the goods, his apparent authority is his real authority, and the owner of the ship is as liable for holding out the party so signing the bills as master, as though he were master; just as the owner of goods, who has held out a broker as having power to sell goods, is bound by such a sale of goods by the broker who has been held out as having such power; the apparent authority in each of such cases being the real authority.

In precisely the same way, and on the same principle, where a

[1] 3 Hill, 262, 270. [2] 15 East, 38, 43.

holds out B. as a partner, A. is bound by the acts of B., within the scope of the business; the apparent authority being the real authority. But, because B., having been held out by A. as a partner, has power to bind A. by contracts within the scope of the business, it does not therefore follow that A. is bound by a guarantee given by B., outside of the scope of the business, unauthorized by A., on the ground that if A. had authorized such a guarantee it would be binding on him, and on the further ground that the very fact that B. has given the guarantee is a warranty to all third parties, binding on A., that A. did give such an authority.

The former of these two propositions, which is a thoroughly sound one, is covered by Pickering *v.* Busk.[1] The latter of the two propositions, which is utterly unsound and absurd, is covered by Armour *v.* Michigan Central R. R. Co.,[2] and Bank of Batavia *v.* New York, &c. R. R. Co.,[3] under the twisting and distortion of the propositions in (as the result of a strict analysis) the self-evident rule, as stated by counsel, in the overruled case of North River Bank *v.* Aymar.[4]

The case in East was one where the act of the owner of hemp in having it placed in the name of a broker, whose business it was to buy and sell hemp, was held to amount to the clothing the broker with an authority to make the sale. Thus, immediately following the extract quoted in North River Bank *v.* Aymar,[5] Lord Ellenborough says: "If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or, if one send goods to an auction-room, can it be supposed that he sent them thither for safe custody? Where the commodity is sent in such a way as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe. . . . The sale was made by a person who had all the *indicia* of property; the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name."[6]

There is no question in this case as to the broker having

[1] 15 East, 38.
[2] 65 N. Y. 111.
[3] 33 Hun, 589.
[4] 3 Hill, 262.
[5] 3 Hill, 270.
[6] Pickering *v.* Busk, 15 East, 43, 44.

exceeded the authority which, in effect, he was held out by his principal to have possessed. Therefore, it has no application to the case of a shipmaster signing bills of lading without receipt of the goods, when he has not been held out by the owner as having any such authority.

Even in North River Bank *v.* Aymar itself, the statement of the law by Cowen, J., in delivering the majority judgment of himself and Bronson, J.,[1] shows that Armour *v.* Michigan Central R. R. Co.,[2] and Bank of Batavia *v.* The New York, &c. R.R. Co.,[3] have been wrongly decided. Thus; "The general rule, that *when an attorney does any act beyond the scope of his power it is void even as between the appointee and the principal, has always prevailed*, and is indeed elementary in the doctrine of powers. The ground on which the rule rests is familiar. The appointee need not deal with the attorney unless he choose; and it is very reasonable that he should be bound to inspect the power, when in writing, or to learn its language in the best way he can, when it is by parol. On becoming acquainted with it, he shall be holden to understand its legal effect, *and must see, at his peril, that the attorney does not transgress the prescribed boundary in acting under it.*"

This is sound law, and is right in the teeth of Armour *v.* Michigan Central R. R. Co., and Bank of Batavia *v.* The New York, &c. R. R. Co., both of which cases hold that the principal is bound by the acts of the agent, though the latter do "transgress the prescribed boundary in acting under it."

Similar sound principles are laid down in the two cases, which, in addition to Pickering *v.* Busk,[4] were cited by the majority of the court in North River Bank *v.* Aymar,[5] to sustain the "rule" formulated by counsel in that case. And both of these were New York cases, the judgments in which were the unanimous judgments of the court.

In the first of these, Andrews *v.* Kneeland,[6] it is said by the court, Savage, C. J., delivering the judgment: "*An agent constituted for a particular purpose, and under a limited and circumscribed power, cannot bind his principal by an act beyond his authority.*"

This exactly describes the position of a shipmaster, or a railway station agent or shipping clerk, who is constituted an agent to sign bills of lading or freight receipts on actual receipt of the goods only; their power being not only so expressly and impliedly "limited and circumscribed," but it being notorious to every one

[1] At p. 266.
[2] 65 N. Y. 111.
[3] 33 Hun, 589.
[4] 15 East, 38.
[5] 3 Hill, at p. 270.
[6] 6 Cow. 354, 357.

that it is so limited and circumscribed; and, therefore, any one taking such a bill of lading or freight receipt does so with full knowledge of the "limited and circumscribed power" of the party who has so signed it; and if he so take it on trust, "he does so at his peril."

The other New York case[1] is to the same effect. There, another New York case, Gibson *v.* Colt,[2] is referred to, where a shipmaster had authority to sell a ship, with reference to which he made an untrue representation, and it was held that the master was a special agent, and if he exceeded his authority when he made the representation, *his principals were not bound*, and therefore *the remedy was against the agent alone*.

This, too, is opposed to the holding in the late New York cases. He had power to sell the ship, as the master has power to sign bills of lading, but "whenever *the very act of the agent*," in selling the ship or in signing the bills of lading, is *not* "authorized by the terms of the power;" or "whenever *by comparing the act done by the agent with the words of the power*, the act itself is" *not* "warranted by such terms used,"[3] then the principal is not bound; as he is not, as the owner of a ship, or proprietor of a railway, when the very terms of the power are that a bill of lading or freight receipt can only be given by a master of a ship or station agent of a railway, on actual receipt of the goods; and such bill of lading or freight receipt has been signed without receipt of the goods.

The absurdity of the late New York cases, which, as we have shown, have not even the bad merit of what Lord Ellenborough condemned in Waring *v.* Cox,[4] as "similitudinary reasoning," is made further apparent by other New York decisions, such as White *v.* Skinner,[5] Munn *v.* Commission Co.,[6] and by the numerous other decisions cited in the reports of these cases.

We have dealt thus exhaustively with this question, because of its great importance, and because of the vast amount of evil that such a decision as Armour *v.* Michigan Central R. R. Co.[7] is calculated to produce.

Finally, it seems that the court itself which delivered the judgment in North River Bank *v.* Aymar,[8] and which was subsequently overruled, were so doubtful as to their own judgment, that they

[1] Rossiter *v.* Rossiter, 8 Wend. 494, 499, stated by us *supra*, p. 41.
[2] 7 Johns. 390.
[3] Rule as formulated in North River Bank *v.* Aymar, 3 Hill, at p. 270, on which, not without a good deal of distortion and misstating, the recent badly-decided New York cases are made to rest.
[4] 1 Camp. 370.
[5] 13 Johns. 307.
[6] 15 Johns. 44.
[7] 65 N. Y. 111.
[8] 3 Hill, 262.

required a second argument before they could agree on the judgment, by even a divided court, which they did deliver. And the very ground upon which they did decide the case, according to their own showing, in the subsequent case of Stainer *v.* Tysen,[1] is conclusive to show that the case, even before it was overruled by the Court of Errors, was no authority whatever for Armour *v.* Michigan Central R. R. Co.[2]

In this latter case, the power of the master, or railway station agent, with reference to bills of lading and freight receipts, is a special one, limited and qualified by the fact that he has no power to sign them except on receipt of the goods. While, in the exceptional matter of negotiable paper, as was the case in North River Bank *v.* Aymar,[3] the principal had "authorized another *in general words and without any qualification* to give his notes."

Cowen, J., who delivered the judgment of himself and Bronson, J., in North River Bank *v.* Aymar, says of that case, in Stainer *v.* Tysen[4]: "The argument by which those who advance money or discharge debts on the faith of paper executed under letters of attorney like this, claim that the principal should be bound at all events, is, that he has authorized another *in general words and without any qualification* to give his notes. That having given *such authority*, he cannot require any person who takes under it to notice and decide at his peril whether the agent acts in good faith towards his principal or not. That he has virtually authorized his agent to speak conclusively and by way of estoppel as to all extrinsic circumstances, — *all facts not apparent on the face of the power*, or actually known to the man who trusts to it. That the attorney, by the very act of making the note, &c., does, in effect, declare that it is available. Some of us felt so much difficulty upon this argument in the North River Bank *v.* Aymar, that we held the question under advisement and directed a second discussion, which took place in the course of the same term at which the present case was argued. The answer given to the argument is, that such letters of attorney import, in their own nature, an obligation to act for and in behalf of the principal and in his proper business; that the man who receives the note is bound to look to the power, and in so doing must take notice of its legal effect at his peril; that he is therefore bound to see that the attorney does not go beyond his power by making or indorsing notes for the benefit of himself or persons other than his principal."

[1] 3 Hill, 279 *et seq.*
[2] 65 N. Y. 111.
[3] 3 Hill, 262.
[4] 3 Hill, 280, 281.

As the shipmaster is not authorized "*in general words and without any qualification*" to sign bills of lading; and as the fact is "*apparent on the face of his power*" that he is not authorized to sign bills of lading without receipt of the goods; the *ratio decidendi* of North River Bank *v.* Aymar itself, is, as explained by the same court, and by the same judge who delivered the judgment, in Stainer *v.* Tysen,[1] that the party taking such bills of lading, as consignee, or indorsee, "*must take notice of the legal effect*" of the power "*at his peril;*" and, therefore, in principle, North River Bank *v.* Aymar,[2] instead of being an authority in favor of Armour *v.* Michigan Central R. R. Co.,[3] is actually an authority against it.

It is thus obvious why the counsel in North River Bank *v.* Aymar,[4] stated his proposition in the self-evident manner in which he did, and in a manner radically different from the way in which it has since been misunderstood, misstated, and distorted. Because, in that case, the power was actually *general and without limitation or qualification in the power itself*, to sign notes in the name of the principal; entirely unlike the case of a shipmaster acting, in signing bills of lading, under special, limited, qualified power. It therefore suited counsel's purpose in North River Bank *v.* Aymar,[5] to say almost literally, "If the agent has the power, he has the power," or, really literally, "*If the very act done is within the very terms of the power*, then the principal is bound."

The ultimate outcome of this grossly distorted rule, in 65 N. Y. and 33 Hun, is as opposite to the rule as originally stated, as the antipodes are to each other; and, as far as Armour *v.* Michigan Central R. R. Co.[6] rests on the authority of that rule; and, misunderstanding, misstating, and misconstruing it, it does so completely; that case, and the few other cases which have followed it, are thus shown to have been decided absolutely without even the semblance of authority.

After this *exposé* it will not be surprising to find Story, without having been aware that the judgment had been reversed, actually citing North River Bank *v.* Aymar,[7] as he he does, not for any such proposition as is contained in Armour *v.* Michigan Central R. R. Co.,[8] but really for this: —

"An agent, who is authorized to draw and indorse notes, and to draw, indorse, and accept bills of exchange, *can act under*

[1] 3 Hill, 280 *et seq.*
[2] 3 Hill, 262.
[3] 65 N. Y. 111.
[4] 3 Hill, 262.
[5] 3 Hill, 262.
[6] 65 N. Y. 111.
[7] 3 Hill, 262.
[8] 65 N. Y. 111.

such authority only to the extent of his principal's business," &c.;[1] evidently not for one moment fancying that that case was intended in effect to overrule and reverse the whole mass of the law in Chapter 6 of his work on Agency, on the Nature and Extent of the Agent's Authority, and to unsettle and destroy the great mass of the well-established principles of law, which, growing with the common law itself, have grown up and become that which we recognize and know as the Law of Agency.

[1] Story on Agency, 9th ed. § 69.

BOOK III.

PART II.

RAILWAY CONTRACTS FOR THROUGH CARRIAGE OF GOODS.

CLOSELY connected with the subject of Sales is that of the forwarding of the goods sold and bought. Indeed, the forwarding of the goods is very frequently made an essential part of their purchase, as the express condition on which the goods are bought. As we have intimated in the concluding note to Volume I. of this work, the decisions in this country as a whole, upon the question of the liability of railroad companies and other common carriers, for the transportation of goods received by them, to be conveyed over an entire route, of which the receiving carrier directly controls but one link of the entire chain of route, are in a most unsatisfactory state.[1]

The law as established in England on the question, as we shall clearly show, notwithstanding the statements to the contrary by some of the text-writers and by many of the courts in this country, is perfectly sound, and the decisions there uniform and thoroughly consistent. In this country, however, the state of facts in the matter is, we think, directly and sadly otherwise. We trust to make the law in the matter perfectly clear, removing, in a full investigation of the cases decided in England and in this country, all the doubt and uncertainty which vicious decisions and perverted interpretation have thrown about the subject.

Where the carrier enters into an express contract for the carriage of goods, it is clear that, whether in England or in this country, the extent of his liability, where a loss takes place on a portion of the route not under the carrier's immediate control, depends on the nature of his contract rather than on any general

[1] Our intention, when commencing the discussion of this subject, was to make it a note to Volume I. p. 658; but in our thorough discussion of the subject we were carried to such length that we decided to make it a separate Part; the importance of the question involved, and its unsatisfactory position in this country, fully justifying us in doing so. We trust that with this, as with the many other conflicting questions of law we have investigated in this work, it will be found that we have reached a sound and unanswerable conclusion.

principle that he is, or is not, liable, independent of the terms of his contract. For instance, if a carter take goods from a warehouse under a contract to deliver them to a ship or a railway, his contract is executed when he delivers the goods to the contract destination, the ship or railway. But if a carter take goods under a contract to deliver them to a distant place, the contract destination is that distant place, even though he may himself convey them over only a portion of the route. In the large majority of such cases it is a question, whether in England or in this country, as to what is the proper construction of the carrier's contract. In great numbers of such cases the goods are carried under contracts the terms of which are clearly expressed, and where the construction should be precisely the same whether the question arises here or in England. The liability of the carrier, we take it, in such cases, is simply that of contract, and where the terms of the contract are not expressed, and the contract has to be established by evidence from which the nature of the contract has to be deduced or implied, it is obvious that very slight circumstances necessarily have great weight in governing courts in their decisions as to what the contract is. The liability being simply that of contract, the contract being shown will govern the particular case, and we see no reason, on principle, why the construction of any particular contract should be different here from what it would be in England, or in one State from what it would be in another. We examine some of the authorities.

Upton *v.* Clark [1] was an action against the defendant as a common carrier. It appeared that the defendant kept a booking office, at which parcels were booked for a considerable number of coaches and wagons, and that the box for which the action was brought was booked there. The words, "conveyances to all parts of the world," were on a board at the side of the door of the defendant's office, with a list of places, including Windsor. The box was booked for Windsor, and was delivered by the defendant to a Windsor carrier, but never reached there. On this evidence, Lord Tenterden held that the defendant was not liable; the contract with the keeper of a booking office not implying that he assumed the responsibility of the carrier.

This case was affirmed in Gilbert *v.* Dale,[2] Coleridge, J., there saying: "In the case of a carrier, the law presumes that he will do his duty; and a plaintiff who charges him with the breach of it, must give some evidence of non-performance. The fact that the goods have not reached the consignee is such evidence against the carrier, and calls upon him to discharge by other proof. So

[1] 2 C. & P. 598. [2] 5 A. & E. 543.

in the case of the keeper of a booking office; to call on him for an answer to such a charge as the present, some evidence must be given of the non-performance of his undertaking; but that is not done by merely showing non-delivery of the goods to the consignee. *Suppose goods were left with a carrier to be taken by him to York, and from thence forwarded to Edinburgh, would it be sufficient, in an action against him for negligence, to show that the goods did not reach Edinburgh?*"

So, in Syms *v.* Chaplin,[1] as to the persons contracting, the evidence showed that the first receiver of the goods did not contract to carry them to London, but only to carry them to Meeksham to be conveyed or forwarded to London, and it was held that his responsibility ceased on delivering the goods at Meeksham, and that the carrier from Meeksham to London, to whom the goods were delivered at Meeksham, was the party responsible to the owner for their loss. And in Garside *v.* The Trent Navigation Co.,[2] where the defendants' contract was to carry goods from Stourport to Manchester, to be thence *forwarded* to Stockport, and the goods were destroyed by an accidental fire in a warehouse at Manchester before they had an opportunity to forward them to Stockport, they were held not liable, as they were then holding as warehousemen, and not as carriers.

The question came up in Hyde *v.* The Trent & Mersey Navigation Co.,[3] where the receiving carrier contracted to carry goods to Manchester, and they were destroyed by fire at Manchester; the question being whether the carrier was liable for their non-delivery at the residence of the consignee in Manchester. The carriers having included in their freight a charge for cartage, they were held liable for the loss, caused by the act of a connecting carter. The matter was considered by all the judges as to whether such a liability would have otherwise existed, with reference to which they were undecided, but they all held that the charge for cartage was decisive to show that the liability of the defendants continued until the goods were delivered. The case is an instructive one and, on this point, is quite in harmony with Muschamp *v.* Lancaster Railway Co.,[4] and the later English cases. The following, as applicable to some of the decisions in this country, from Grose, J., in Hyde *v.* The Trent & Mersey Navigation Co.,[5] is noteworthy: "Whether it be or be not a delivery *may depend on the general custom of the trade, or the particular usage which has prevailed between the parties themselves.*" But in Fowles *v.* The

[1] 5 A. & E. 634, 643.
[2] 4 T. R. 581.
[3] 5 T. R. 389.
[4] 8 M. & W. 421.
[5] 5 T. R. 399.

Great Western Railway Co.,[1] although the receiving railway made one entire charge for conveying goods as well by their own railway as by connecting carriers, they were held not liable for a loss caused by a connecting carrier, having specially by a clause in their contract exempted themselves from such liability.

So in Muschamp *v.* Lancaster Railway Co.,[2] which has become the great leading case on the question, the matter is put simply as one of contract. There, a parcel was delivered at Lancaster, to the Lancaster Railway Co., directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said it had better be paid by the person to whom it was directed, on the receipt of it. The Lancaster company were known to be proprietors of the line only as far as Preston, where the railway unites with the North Union Line, and that afterwards with another, and so on into Derbyshire. The parcel was lost after it was forwarded from Preston. The judge (Rolfe, B.) directed the jury that when a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier. This direction, about the correctness of which we should think there could scarcely be a question, was unanimously sustained by the full court.[3]

[1] 7 Ex. 699.

[2] 8 M. & W. 421.

[3] Lord Chief Baron Abinger thus dealt with the matter: "The simple question in this case is, whether the learned judge misdirected the jury in telling them that, if the case were stripped of all other circumstances beyond the mere fact of knowledge by the party that the defendants were carriers only from Lancaster to Preston, and if, under such circumstances, they accepted a parcel to be carried on to a more distant place, they were liable for the loss of it, this being evidence *whence the jury might infer* that they undertook to carry it in safety to that place. I think that in this proposition there was no misdirection. It is admitted by the defendants' counsel that the defendants contract to do something more with the parcel than merely carry it to Preston. They say the engagement is to carry to Preston, and there to deliver it to an agent, who is to carry it farther, who is afterwards to be replaced by another, and so on until the end of the journey. Now, that is a very elaborate kind of contract. It is in substance giving to the carriers a general power along the whole line of route to make at their pleasure fresh contracts, which shall be binding upon the principal who employed them. But if, as it is admitted on both sides, it is clear that something more was meant to be done by the defendants than carrying as far as Preston, is it not for the jury to say *what is the contract, and how much more was undertaken to be done by them?* Now, *it certainly might be true that the contract between these parties was such as that suggested by the counsel for the defendants;* but other views of the case may be suggested quite as probable; such, for instance, as that these railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last. The fact that, according to the agreement proved, *the carriage*

Muschamp *v.* Lancaster Ry. Co.[1] was affirmed in the Queen's Bench, in Watson *v.* The Ambergate Ry. Co.,[2] where the company was held liable for damages caused by delay in forwarding a model which was to compete for a prize, although the delay was not caused by the receiving and contracting railway, but by a connecting railway. Patteson, J., said: "If carriers receive a package *to carry it to a particular place*, whether they themselves carry it all the way or not, they must be said to have the conveying of it to the end of the journey, and the other parties to whom they may hand it over are their agents. We must adhere to this principle, and the company are clearly liable, unless the facts show that their responsibility has determined." The question was similarly decided in Scothorn *v.* South Staffordshire Ry. Co.,[3] and on the same ground as in the previous cases, namely, that it was a matter of contract. The plaintiff delivered at the company's

was to be paid at the end of the journey, rather confirms the notion that the persons who were to carry the goods from Preston to their final destination were under the control of the defendants, who consequently exercised some influence and agency beyond the immediate terminus of their own railway. Is it not, then, a question for the jury to say *what the nature of this contract was?* and is it not as reasonable an inference for them to draw, that the whole was one contract as the contrary? I hardly think they would be likely to infer so elaborate a contract as that which the defendants' counsel suggest, namely, that as the line of the defendants' railway terminates at Preston, it is to be presumed that the plaintiff, who intrusted the goods to them, made it a part of his bargain that they should employ for him a fresh agent both at that place and at every subsequent change of railway or conveyance, and on each shifting of the goods give such a document to the new agent as should render him responsible. Suppose the owner of goods sent under such circumstances, when he finds they do not come to hand, comes to the railway office and makes a complaint, then, if the defendants' argument in this case be well founded, unless the railway company refuse to supply him with the name of the new agent, they break their contract. It is true that, practically, it might make no great difference to the proprietor of the goods which was the real contract, if their not immediately furnishing him with the name would entitle him to bring an action against *them*. But the question is, why should the jury infer one of these contracts rather than the other? Which of the two is the more natural, the more usual, the more probable? Besides, *the carriage money being in this case one undivided sum*, rather supports *the inference*, that although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners *inter se* as to the carriage-money, — a fact of which the owner of the goods could know nothing, as he only pays the one entire sum at the end of the journey, which they afterwards divide as they please. Not only, therefore, is there *some evidence* of this being the nature of the contract, but it is the most likely contract under the circumstances; for it is admitted that the defendants undertook to do more than simply to carry the goods from Lancaster to Preston. *The whole matter is therefore a question for the jury to determine what the contract was on the evidence before them.* . . . In cases like the present, *particular circumstances might no doubt be adduced to rebut the inference which, primâ facie, must be made, of the defendants having undertaken to carry the goods the whole way.* The taking charge of the parcel is not put as *conclusive* evidence of the contract sued on by the plaintiff; it is only *primâ facie* evidence of it; and it is useful and reasonable for the benefit of the public that it should be so considered. It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents to carry forward."

[1] 8 M. & W. 421.

[2] 15 Jur. 443.

[3] 8 Ex. 341.

station in Staffordshire certain goods addressed "to the East India Docks, London," and paid one sum for their carriage the whole distance. By the practice of the company all goods delivered at that station for London are forwarded on their own line to Birmingham, and from thence by the London & North-Western Railway. Before the goods in question arrived in London, the plaintiff directed a clerk at the London station of the latter company to forward them to another place, which the clerk promised to do. The goods were, however, delivered according to the original address, and were thereby lost. The Court of Exchequer held, unanimously, that the South Staffordshire Railway Company were liable for the loss.[1]

The same principle was acted on by the Court of Common Pleas, in Crouch *v.* London & North Western Ry. Co.,[2] where it was held,[3] that there can be no reason why one company should not be common carriers upon the line of another company. Whether they are or not is clearly a matter of contract; or which amounts to the same thing, as in this case, where they hold themselves out as such common carriers over another line. Thus, in this case, it was held, that a railway which holds itself out as a carrier of goods between two places, one of which is beyond the confines of England, is still subject to the common-law liability of a carrier for hire, and is bound to accept all goods which are reasonably tendered to it for conveyance between those limits, even though its line extends only a part of the distance between such limits, connection being made at an intermediate point with another railway.

Wilby *v.* The West Cornwall Ry. Co.,[4] where a part of the carriage was by water, by steamboat, is to the same effect; the contract with the railway company being held to have covered the entire distance.[5]

[1] Alderson, B., said: "There can be no doubt that the defendants made a contract to carry the plaintiffs' goods the whole distance to London, for certain reward for the entire journey; and there is also no doubt that they would have been liable for loss through their negligence in carrying during any part of that journey. Then, the question arises, what was the contract between the parties? *It really amounts to no more than a question of fact;* and there is abundant evidence of a contract to deliver, as stated in the declaration, according to the plaintiffs' directions, in London. It is true that originally, when the goods were placed in the defendants' possession, the direction given by the plaintiffs was to put them on board The Melbourne, at the East India Docks; but the plaintiffs, having altered their intention, communicated it to the defendants' agent, who was authorized to deliver the goods according to the original contract, and desired him not to send them according to the direction upon the packages, but elsewhere. By some negligence that order was disobeyed, and the goods are lost. Then it is said that the defendants have performed their contract; but that is not so. Their contract was to procure their agent to deliver according to the plaintiffs' directions. That they have not done, and have in consequence occasioned a loss which they are bound to make good."

[2] 14 C. B. 255.

[3] See p. 279, *per* Jervis, C. J.

[4] 2 H. & N. 703.

[5] And see Machu *v.* The Southwestern Ry. Co., 2 Ex. 415. Crouch *v.* The Great

The decision in Bristol & Exeter Ry. Co. *v.* Collins,[1] is, we think, as far as regards the construction in the House of Lords of the condition embodied in the railway contract, a most unsatisfactory one. Where the contract was, as in this case, in effect, that the company was *not* to be liable "beyond the extent of *their own railway*," it is difficult to understand how this language could be so misconstrued, as to treat it as a declaration that they *would be liable* "beyond the extent of their own railway," for the loss, damage, or detention, caused by another railway "beyond the extent of *their own railway*," but connected with it. It is obvious that two — Lord Wensleydale and Lord Kingsdown — of the four Law Lords who decided the case (thus reversing the unanimous decision of the Exchequer Chamber, and holding *contra* to the opinion of the majority of the judges before them, Byles, Crompton, Williams, and Wightman, JJ.; Watson and Martin, BB., only, differing), were very doubtful about the correctness of the decision. It was, in fact, admitted by Lord Wensleydale, that, by the condition it might, indeed, "have been the intention" of the railway company "to contract to carry along its line only;" that he had considerable difficulty in making up his mind upon it; but that, on the whole, though he had considerable doubt in the course of the proceeding, he agreed with the opinion of the minority of the judges before them. Lord Kingsdown, too, looked "upon the case as one of doubt," but was not prepared to dissent from the decision. We think that the decision of the Exchequer Chamber is right, and that that of the House of Lords is wrong. But as far as it affects the question we are examining, the decision is entirely governed by the language in the condition; and, whether right or wrong, simply depends upon the question whether the construction placed on the contract is correct or not, and not as to the principle involved with reference to the general liability of a railroad company in contracting to carry goods beyond the limits of their own railroad.

We think that, where an apparent difficulty on this point exists, it will be found to arise on some question relating to the construction of the contract. Thus, it will be seen, that in all of the English cases which we have examined, in each case the question has arisen as to what, under the facts of the case, the particular contract was; and, as we have seen, in those differing facts, it has sometimes been held that the first receivers of the goods were

Western Ry. Co., 2 H. & N. 491, follows and approves Scothorn *v.* The South Staffordshire Ry. Co., 8 Ex. 341. Bramwell, B., dissents; but he expressly agrees with the law as decided in Muschamp *v.* The Lancaster Ry., 8 M. & W. 421.

[1] 7 H. L. Cas. 194.

contracting with reference to the entire route, and in others, that they were not so.

With the exception of the decision of the House of Lords in Bristol and Exeter Ry. *v.* Collins,[1] which was an extremely doubtful construction, simply, of the condition in a contract, we think every case on the point which we have so far examined, should be concurred in by any court administering the principles of the common law.

The general law, equally applicable to this country as to England, is well stated by Crompton, J., with whom, both in delivering the unanimous judgment of the Exchequer Chamber,[2] and in answering the questions put to the judges by the House of Lords, we entirely concur.[3]

[1] 7 H. L. Cas. 194.

[2] Collins *v.* The Bristol & Exeter Ry. Co., 1 H. & N. 517; 26 L. J. N. S. Ex. 103.

[3] As it has been repeatedly stated by courts and text-writers in this country that there is a radical difference as to the settled law in England and in this country generally in the matter, we quote from the opinion of Crompton, J., in Bristol & Exeter Ry. Co. *v.* Collins, 7 H. L. Cas. 211 *et seq.*, what we think is an accurate statement of the law equally applicable to both countries: "It may be remarked that since the great improvements which have taken place in modern times in the transmission of goods along a line where there may be two or three or more distinct carriers or carrying companies, the contracts which have been made by the carrier who first receives the goods have been of three descriptiona. The first is *where the carrier receives the goods to carry from A. to B.*, and where having so received the goods to be carried he is bound to carry them by himself or his agents. If he contracts with another company to carry them beyond the place where his own means of carriage extends, he is answerable as a common carrier just as much as if he had carried them in his own carts or vans, in his own ship, or on his own railway. It is nothing to the parties sending the goods in what way he performs his undertaking for the care and carriage of the goods. This is the common case where goods, parcels, or passengers are booked at a railway station as from A. to B. *When the facts are ascertained there is no difficulty as to the law,* and nothing could be further, I believe, from the minds of any of the judges who decided the present case in the Exchequer Chamber than to entertain any doubt of the principle upon which Muschamp *v.* The Lancaster Ry. Co., 8 M. & W. 421, and other cases of that description were decided, and which is acted upon by judges and juries without any doubt at almost every sitting and assize. Companies not liking such liabilities for loss and accidents, where they have no control beyond their own line of railway or their own carriage, frequently adopt a different mode of contracting, and absolutely refuse to book beyond their own line. In such second case there may be considerable inconvenience to the public. It may be a great annoyance for passengers to rebook on entering on a new line; and the owner of goods might find it almost impossible, or expensive, to meet his goods or send to meet them for the purpose of transferring them from one line to another, or from a line of canal or railway to vans, boats, or carriages of other carriers. The carrier receiving the goods may, therefore, for the convenience of the public or his customers, adopt a third species of contract. He may say: 'We do not choose to undertake responsibilities for negligence and accidents beyond our limits of carriage, where we have no means of preventing such negligence or accident; and we will not, therefore, undertake the carriage of your goods from A. to B.; but we will be carriers no farther; but to protect you against the inconveniences and trouble to which you might be exposed if we only undertook to carry to the end of our line of carriage, we will undertake to forward the goods by the next carriers, and on so doing our liability shall cease, and our character of carriers shall be at an end; and for the purpose of so forwarding and of saving the trouble of two payments we will take the whole fare, or you may pay as one charge at the end; but if we receive it we will receive it only as your agents for the purpose of ultimately paying the next carriers.' Contracts of a somewhat similar

The case of Webber *v.* The Great Western Ry. Co.[1] is in harmony with all the other English cases on the question involved,

nature were made when consignments of large quantities of gold began to be made from California to this country. The gold was delivered in California to a ship which carried it to the port in the Pacific, from which it was carried across the Isthmus to the port in the Atlantic, and then brought to a port here; and on the bill of lading was a stipulation that the companies receiving should only be responsible for loss or damage as far as they carried, but that the consignor must look to the other company for loss whilst in their care. This course, whilst it protects the receiving carrier from responsibilities which it would be hard upon him to bear, and which, as he is not a carrier on the farther line or road, there is no obligation on him to undertake, is, especially in the case of lines of railway, more convenient for the customer than the mode according to which he would have to pay on more than one occasion, and would have to provide some person to see to the transferring of the goods. It is forbidden by no law; and if the parties agree to it there is no ground for complaint. It must be remembered that the carrier in these cases is not bound to undertake to carry goods beyond his own line, and there is no law to compel him to undertake any further duty with respect to the goods, and *it must depend entirely on the contract whether he undertakes any duty after the goods have arrived at the place beyond which he does not carry.* He may by contract, *to be implied from his conduct, or by express contract*, agree to perform a further duty; and it is by such contract only that he can be liable either as a carrier beyond his own line or as an agent to forward along another."

We think this is a thoroughly clear and accurate exposition of the law, and that it is quite as applicable to this country as to England.

In making an application of these principles to cases of doubt and uncertainty it is no more remarkable that courts should differ as to the construction of a railway contract than that they differ, as they so frequently do, in the construction of other contracts. We think it is difficult to find, either in England or in this country, a case where there was a more marked difference of opinion than in the case we have been examining, and which, ultimately decided in the House of Lords, was, as there decided, assented to only with the greatest doubt by two of the four Law Lords (Lords Wensleydale and Kingsdown) sitting in the case. And the grounds taken by the other two Law Lords for their decision are very far from being satisfactory. Thus Lord Cranworth laid it down that the company receiving the goods could only limit their liability for loss by either of the connecting lines by stating that limit "in a manner *incapable of being misunderstood.*" This, we think, is not a sound rule of construction of contracts, whether the contract be that of carriers or others. But if it were, one would reasonably think that there was not much room for misunderstanding when the company embodied in their contract such matter as this: "And *the company* hereby give notice that any money which may be received by them for the conveyance of goods by other carriers beyond their said limits will be so received only for the convenience of the consignors, for the purpose of being paid to such other carriers, *and will not be received as a charge made by the company upon the goods in the capacity of carriers* BEYOND THE EXTENT OF THEIR OWN RAILWAY," etc.

Language more strongly to declare that the receipt of payment for the conveyance of goods was not to be misconstrued as an acknowledgment of liability "beyond the extent of their own railway" could scarcely have been used, and yet the receipt of such entire payment was made a strong element in the decision of the case. The language of Lord Chelmsford during the argument (at p. 200), in inquiring as to the practice of "the company," where he certainly thought there was no ground for his language being "misunderstood," is certainly on the point not clearer. He asks: "Does *the company* use different receipt or ticketing notes when carrying goods *within the limits of its own line alone?*" This language and that used in the condition are essentially convertible; and the meaning of the language we have above quoted from the condition seems quite as clear and explicit as that used by Lord Chelmsford himself. Then again the language in the shipping note was: "To be *sent* to Torquay Station." This was construed to mean "to be *carried.*" Of course the goods could not be sent without being carried *by some one.* But the words "to be sent to Torquay" would be more consistent with the idea that the receiving company were to send them to Torquay than that they were themselves to carry them there. The fact that they were themselves to carry them a part of the distance, in order the better to send them

[1] 3 H. & C. 771.

and fully sustains the ruling of Rolfe, B., in Muschamp *v.* Lancaster Ry. Co.[1] The facts were as follows: The plaintiff deliv-

to Torquay, would not militate against this construction as it is made to do in the case. See *per* Martin, B., at p. 223. And while the conditions in the contract are wide enough to include cases where the goods are forwarded longitudinally from the company's line, we think that, as a part of the entire contract, they are capable of being fairly construed so as to cover cases where the goods are to be forwarded latitudinally by the connecting railways "*beyond the extent of their own railway;*" more particularly, as in the 13th condition it is expressly declared "That the above conditions *apply to all goods* received by the *above-named company* at all or any of their offices and warehouses wherever situated; and *as to all goods intrusted to them, they will only carry them subject to the above conditions.*" And while the Lord Chancellor (Lord Chelmsford) himself admits that, "As, however, the goods were received expressly 'on the conditions stated on the other side,' *I do not think that any one of the conditions can be dispensed with;* nor if the 10th condition bears the meaning given to it by the plaintiff would it be at all necessary to deprive it of its effect:" and "a contract to convey goods from A. to B., with a condition that for a certain part of the journey the company will not be responsible, will be no more inconsistent with the absolute contract for the whole journey than where a carrier undertakes to convey goods with a condition that for certain descriptions of goods he will not be liable at all" (p. 231); yet, although these conditions were thus expressly made a part of the contract, we find the learned Lord Chancellor himself (at p. 232) virtually expunging the most important condition (the 10th) from the contract, saying, "This condition, therefore, appears to me to have *no application at all to the present contract*, which is for the conveyance of goods that are to be sent by the Great Western Railway Company to a place on the line of another company." To construe these conditions out of the contract Lord Chelmsford was forced to construe "beyond the extent of *their own railway*" in a most unnatural manner, and in a directly opposite way to that in which (at p. 200) he had himself used the analogous words "*within the limits of its own line;*" he there meaning, as clearly do the other words, their own line as distinguished from lines "beyond the extent of *their own railway.*"

There is one other point to which reference should be made. It is the point made by Martin, B. (at p. 225), and by Lord Wensleydale (at p. 239), as to the entirety of the payment of the freight. But just, as Lord Chelmsford has pointed out, as there may be a contract to carry an entire distance, with a provision for exemption from loss for a part of the distance, so is it true, as correctly pointed out in the very able opinion of Crompton, J., that there may be an agreement (such as is expressly provided for in the conditions in this case) that payment may be received by a railway company for an entire distance, and yet "that any money which may be received by them as payments for the conveyance of goods by other carriers beyond their said limits will be so received only for the convenience of the consignors, *for the purpose of being paid to such other carriers*, and will not be received as a charge made by the company upon the goods in the capacity of carriers *beyond the extent of their own railway*," and "the above conditions apply to all goods received by the above-named company at all or any of their offices and warehouses wherever situated, and as to all goods intrusted to them they will only agree to carry them subject to the above conditions." In a case like this the receipt of the entire payment carries with it no implied liability of the receiving company over the entire route, along a part of which there are independent connecting companies.

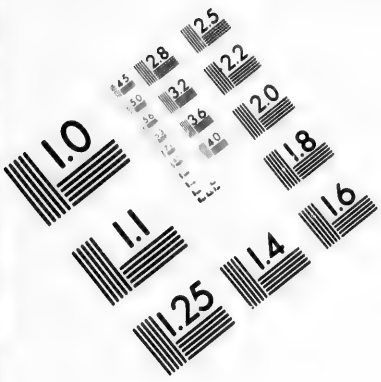
Where goods are received by a railway, as in Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421, and in some of the other cases, to be carried from A. to B., the fact of the entirety of the freight may with such a receipt be an important element in construing the contract, to show that it was an entire contract by the receiving company to carry the goods the whole distance, though a part of the route might be traversed by connecting companies; but where there is an express condition otherwise, as we think there was in Bristol & Exeter Ry. *v.* Collins, 7 H. L. Cas. 194, it seems to us there is no room there for such an implication. On the whole, we think that the unanimous decision in this case of the Exchequer Chamber, and the answers of Byles, Crompton, Williams, and Wightman, JJ. (four out of the six judges), sounder than the decision in the House of Lords; and that the very strong doubts of two of the four Law Lords who hesitatingly assented to the decision were fully justified. And we should not think it at all

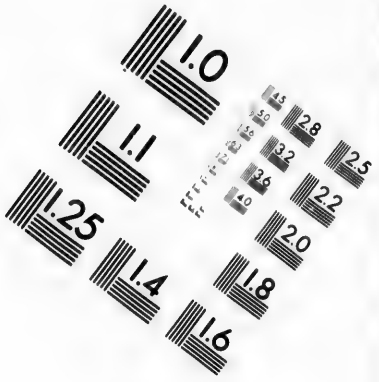
[1] 8 M. & W. 421.

ered to P. at Worcester a package addressed to the plaintiff to be carried from Worcester to Chester. P., who acted as agent for receiving goods both of the Great Western Ry. Co. and London & N. W. Ry. Co., wrote under the address, "*Via* Stafford," and delivered the package to the defendants, who carried it on their line to Stafford, from whence it was carried in the defendants' wagons on the line of the London & N. W. Ry. to Chester. At the trial before Blackburn, J. (one of the very ablest of the English judges), the jury were directed that one question was, did the defendants contract with the plaintiff to carry the goods from Worcester to Chester. If P. was the agent for the customer to contract with the defendants, and did so contract, the plaintiff was right. But if P. was agent for the London & N. W. Ry. Co., and as such accepted the goods from the customer for them, the plaintiff should sue either P. or the London & N. W. Ry. Co. The jury having found for the plaintiff, leave was reserved to the defendants to move to enter a verdict for them if the court should be of opinion that there was no evidence on which the jury ought to have found that the defendants were liable. On the argument Bramwell, B., said: "The question is whether there was evidence for the jury of a contract by the Great Western Ry. Co. to carry the whole distance from Worcester to Chester;" to which counsel for the defendants replied: "The words '*via* Stafford' on the receipt note and invoice merely indicated the route by which the clock would go. The defendants might have said, 'We will only carry the clock to Stafford, and there hand it over to the London & N. W. Ry. Co.'" Bramwell, B., again: "Suppose a person delivered to a carrier at Brentford a parcel directed to a person in Calcutta '*per* ship Asia,' and the carrier delivered it to the ship's

singular if in a similar state of facts the courts in this country, however they may differ on the general question, should hold that the contract in the case had been misconstrued, and that the liability of the receiving company in such a case as this had been limited and qualified by the express terms of the contract.

It would seem by the conclusion of his judgment that the Lord Chancellor was not entirely satisfied with his own judgment on the main ground taken by him, as he concludes (at p. 233) with a saving of the utterly untenable position that a clause as to the non-responsibility of the receiving company for loss by fire followed and attached to the goods in the hands of the connecting company. On this point not even Lord Cranworth agreed with him. Lord Cranworth says (at p. 237): "Now if the question had been whether, supposing the Great Western Railway Company (the receiving company) to have sent these goods as agent for Collins by means of the Bristol & Exeter Railway (the connecting company), that portion of the contract between Collins and the company (*i. e.* the receiving company) which related to loss or damage by fire was to be imported necessarily into the contract made with the Bristol & Exeter Railway Company, I confess upon that subject I should have entertained *very considerable doubt*." The whole case, in fact, we think, is one of "very considerable doubt;" and, as an authority on the construction of the contract involved in it, we think is one that, although decided by the House of Lords, will not readily be followed in places where, as in this country, it is not, if wrongly decided, of a binding character.





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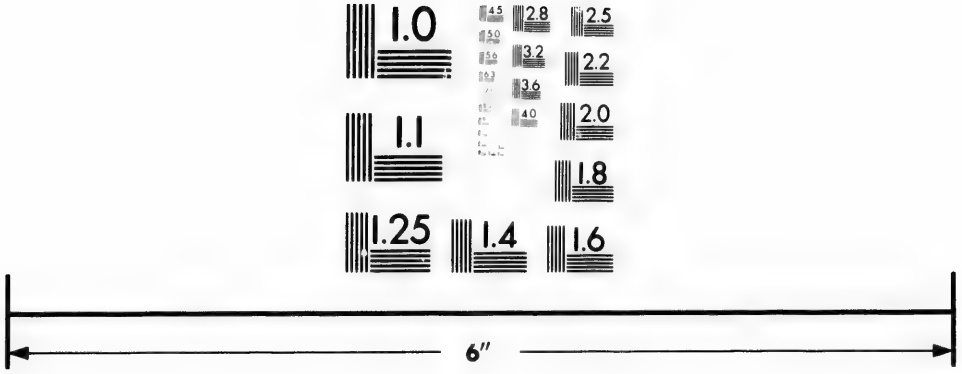

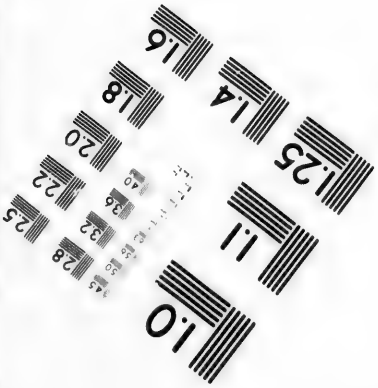

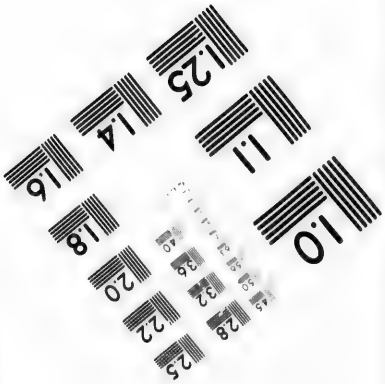

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agent in London, would the carrier be liable for its loss?" To which the counsel replied: "Muschamp *v.* The Lancaster Ry. Co.[1] establishes this principle, that where a railway company undertake to carry goods to a distant place over the lines of other companies beyond their own, that is *primâ facie* one contract to carry the whole distance, and they are liable for the loss of the goods during any part of the journey. That principle was recognized and adopted in Scothorn *v.* The South Staffordshire Ry. Co."[2] And *per* Martin, B.: "The decision of the House of Lords in The Bristol & Exeter Ry. Co. *v.* Collins[3] is conclusive of this case."

The contention for the defendants was similar to that of many decisions in this country, thus: "The contract of the defendants was to carry the clock to Stafford and there deliver it to the London & N. W. Ry. Co. [Bramwell, B.: Suppose a parcel was delivered to the South Western Railway at Reading addressed to a person at Dover, '*per* London, Chatham & Dover Railway,' which company would have been liable if it was lost?] The South Western Ry. Co. would have performed their contract when they delivered the goods to the London, Chatham & Dover Railway."[4] But, in the case itself, the court held, unanimously, that the defendants, the Great Western Ry. Co., were liable.[5] The question as to the liability of the "contracting company" has been simi-

[1] 8 M. & W. 421.

[2] 8 Ex. 341.

[3] 7 H. L. Cas. 194.

[4] In this last assumed case, we should say, if there was nothing else in the case but the address, put on by the shipper, this would be correct, as it of itself would imply that the shipper required the goods to be delivered for him to the London, Chatham & Dover Railway. So, too, in the previous suppositious case of the parcel directed "*per* ship Asia." In this latter case it might well be that the shipper had an independent contract with the ship Asia (somewhat similar to the original contract in Scothorn *v.* South Staffordshire Ry. Co., 8 Ex. 341, to deliver the goods to the ship Melbourne), to carry the goods to Calcutta, and that the carrier at Brentford had no connection whatever with the Asia. The effect, in such a case, would seem to be the same as though the goods were sent from a warehouse by a carter, addressed to a distant place, *per* a ship, or *per* a railway; the implication in such a case being that the carter had performed his contract on delivery by him of the goods to the ship or railway named in the address. The fact, however, of the carrier giving a receipt in a form from which it might be implied that he was contracting to carry the entire distance; or that one through rate was charged for the carriage, or any other matter carrying with it similar implication, might justify a jury in coming to a different conclusion, as in Wilby *v.* The West Cornwall Ry. Co., 2 H. & N. 703, where the contract was held to be to carry the goods by the route named. Where the contract is implied from the facts simply, the conclusion from one state of facts may be very different from what it would be under a state of facts entirely different. The question in all of these cases is, where there is no express contract, what is the contract to be implied from all the facts in the particular case?

[5] Pollock, C. B., in delivering the judgment, said: "The question in this case was whether the Great Western Ry. Co. were liable to the plaintiff for damage done to his clock during the transit from Worcester to Chester. I am of opinion with the rest of the court that there was evidence for the jury of one contract only and not two contracts. The jury have so found, and we think there was evidence to warrant their finding."

larly decided in Ireland, with the additional feature that, in the case of the sale of a through ticket to a passenger, the recognition of the ticket by the different companies is some evidence that they are all parties to the entire contract.[1]

In Mytton *v.* The Midland Ry. Co.,[2] it was held that where, by a traffic arrangement between two railway companies, passengers are booked through, the contract is one entire contract between the passenger and the company issuing the ticket, and that, *under such contract*, the passenger has no remedy against the connecting company for loss of his luggage on their line; his remedy, if any, being against the company with which he contracted. The same doctrine was held in Coxon *v.* The Great Western Ry. Co.,[3] where the question came up under a contract essentially different from that in Bristol & Exeter Ry. *v.* Collins.[4]

In Coxon *v.* The Great Western Ry. Co.,[5] the contract was held to be an entire contract with the receiving railway, for the carriage of live stock over the entire route, and, therefore, *in an*

[1] Keys *v.* Belfast Ry., 8 Ir. C. L. 167, 184. Monahan, C. J., in delivering the unanimous judgment of the court, said: "We are all of opinion, without entertaining any doubt, that, in the first place, there was evidence of an entire contract, inasmuch as the idea that a man who takes a single through ticket from Belfast to Londonderry, thereby entered into four several contracts with four several persons, *including the omnibus proprietor*, is absurd. There also being evidence that the money paid for the through ticket was distributed among all the railway companies, and the fact of each company recognizing the through ticket as entitling the holder to be carried on their line, was some evidence that the clerk who issued the ticket was the agent of all the companies, and, therefore, I was bound to leave the question to the jury as I did, leaving them to decide whether a contract for the entire journey was or was not entered into by all or any of the railway companies." This case was affirmed by the same court in Hayes *v.* South Wales Ry. Co., 9 Ir. C. L. 474. There A. caused swine to be shipped upon a steamer belonging to B., which plied between Cork and Milford Haven. He paid to the agent of B. for a through freight for the conveyance of the pigs to London, *per* the South Wales and Great Western Railways. It appeared in evidence that over the door of the office in Cork, where the freight had been paid, a sign-board was fixed, with the words, "South Wales Railway Company's Office," painted on it, and a similar one over the entrance to the cattle-yard adjoining. The freight receipt-note was also headed with the words, "South Wales Steam Navigation Company." It was also proved by persons who had sent cattle to London, that they had been forwarded for freights paid at Cork, and that claims made upon the South Wales Company had been discharged at the office in Cork by the shipping agent. B. proved that the steamer was his property; that the shipping agents were paid by him and that the words painted on the boards, &c., referred to him, and were not sanctioned by the railway company; but he admitted having made an agreement with the latter, for running his boat in conjunction with their line, and dividing the through-freights. It was held, on this evidence, that the judge was bound to have directed the jury to find that the company were joint contractors with B., in respect of the entire journey, and were accordingly liable for breaches of contract, alleged to have been committed in the conveyance of the swine by the steamer from Cork to Milford; and that, independently of the agreement, there was evidence to go to the jury of such joint liability. This holding only harmonizes with the English cases on the ground of partnership or agency between the carriers.

[2] 4 H. & N. 615; 28 L. J. N. S. Ex. 385.

[3] 5 H. & N. 274.

[4] 7 H. L. Cas. 194.

[5] 5 H. & N. 274.

action on the contract, that the connecting railway was not liable to the shipper for injury to the stock on their portion of the route. There was a clause in the way-bill providing that the receiving railway would not be subject to liability for loss on the connecting railway, but the court held that that did not mean that they would not carry on another railway, but only that they would not be liable for damage arising on such railway, and that while there was an absolute refusal of liability for damage, there was not a refusal to carry.[1]

[1] See Martin *v.* The Great Indian Ry. Co., L. R. 3 Ex. 9, where it was held, under a railway contract for the carriage of goods, the contract containing the clause, "the company accepting no responsibility," that the stipulation did not exempt the defendants from liability for a loss arising wholly from their own negligence, and that, although the plaintiff could not recover for a breach of the contract, the defendants were liable for an injury done to the property through their negligence, whilst the goods were in their custody. The ground of the decision in this case makes it consistent with the holding in Coxen *v.* The Great Western Ry. Co., 5 H. & N. 274, where the plaintiff sought to recover, for damages to live stock while in the possession of the connecting company, under an alleged contract with the connecting company, with which he had no contract; his contract having been with the receiving company. The same distinction is made clear by Hayn *v.* Culliford, 3 C. P. Div. 410; and, on appeal, 4 C. P. Div. 182. There bags of sugar shipped by the plaintiffs were carried in the defendant's steamship from H. to L., at an agreed freight. The vessel was chartered for the voyage by P., who signed the bill of lading as agent. It contained a clause that the owners of the ship should not be liable for the default of the pilot, master, or mariners in navigating the ship, and a farther clause that the captain, officers, and crew in the transmission of the goods should be considered the servants of the shipper, owner, or consignee. The sugar was negligently stowed under oxide of zinc, and was consequently damaged. It did not appear with whom the plaintiffs made the contract of carriage. It was held by the Court of Appeal, affirming the judgment of the Common Pleas Division, that the defendants were liable to compensate the plaintiffs for the damage done to the sugar; for either the defendants had contracted to carry the sugar upon the terms set out in the bill of lading, which did not relieve them from responsibility for negligent storage; or if they had not contracted with the plaintiffs, they were liable for misfeasance, that is, for stowing the goods in such a manner as to come into contact with a mischievous substance. Bramwell, L. J., in delivering the judgment of the Court of Appeal, said: "The case is in a dilemma. Either there was a contract between the plaintiffs and the defendants, or there was not. If there was a contract between them, it is the one contained in or evidenced by the bill of lading. Now it is clear that if that is the contract, the defendants are liable on the ordinary contract of a carrier, unless (and there is not) there is some clause in the contract to relieve them; whether the words in other respects would extend to this case we need not say, as there is one respect in which they do not; they extend to the acts of captain, officers, and crew; they do not extend to the acts of the defendants and their other agents and servants, therefore not to the acts and defaults of the stevedore. But it is by these acts and defaults that the goods were damaged. If, then, there is a contract between the plaintiffs and defendants, the defendants are liable. So, also, if there is not. For if so the case is this: The goods were lawfully with the defendants' license in their ship, and they tortiously so dealt with them that the goods were injured. It was found, as a fact, that the loading of the oxide was negligent. It was, therefore, wrongful, not as a breach of contract, but as a wrongful act in itself. If the defendants had done what was done wilfully, that is to say, intentionally, that it would injure the plaintiff's goods, it is clear they would be liable. But what difference does it make that they did it ignorantly? It may be asked, where is the duty of care? I answer that duty that exists in all men not to injure the property of others. This is not a mere non-feasance which is complained of; it is a misfeasance; an act and wrongful. Suppose A. lets B. a horse, B., with C.'s license, puts up at C.'s stables for reward to C. from B.; C. turns into the stables loose a vicious horse, known to be such, not to injure A.'s horse, but not thinking

of the matter. There cannot be a doubt that C. would be liable to A. if the horse was injured. So if he gave the horse bad oats which injured the horse, he would be liable, though he would not be to A. if he omitted to feed him. So here justice is done, though indirectly. [*Directly*, in the case put, we should rather say; the next case put is where the remedy is indirect or circuitous. AUTH.] It is certain that if the charterers sued on the charter in respect of the complaint in this action, there would be no defence, and it is certain that they ought to sue, if necessary, for the benefit of the plaintiffs." See Sack *v.* Ford, 13 C. B. N. S. 90; Sandemann *v.* Scurr, L. R. 2 Q. B. 86; The St. Cloud, Br. & Lush. 4; Gilkison *v.* Middleton, 2 C. B. N. S. 134; Czech *v.* General Nav. Co., L. R. 3 C. P. 14; Taylor *v.* Liverpool & Great Western Steam Co., L. R. 9 Q. B. 546; Good *v.* London Steamship Association, L. R. 6 C. P. 569; Schuster *v.* McKellar, 7 E. & B. 704; Fletcher *v.* Rylands, L. R. 3 H. L. 330; Jones *v.* Festiniog R. Co., L. R. 3 Q. B. 733; Alston *v.* Herring, 11 Ex. 822; Brass *v.* Maitland, 6 E. & B. 470; Ohrloff *v.* Briscall, L. R. 1 P. C. 231; Steel *v.* State Line S. S. Co., 3 App. Cas. 72; Blaikie *v.* Stembridge, 6 C. B. N. S. 894.

The same principle governing Martin *v.* The Great Indian Ry. Co., L. R. 3 Ex. 9, and Hayn *v.* Culliford, 3 C. P. Div. 410, 4 C. P. Div. 182, was applied in Foulkes *v.* The Metropolitan District Ry. Co., 4 C. P. Div. 267; affirmed in the Court of Appeal, 5 C. P. Div. 157. The defendants had running powers over the Southwestern Railway between H. and the R. station of the Southwestern Ry. Co. Above the booking office at the R. station were the words, "Southwestern and Metropolitan Booking Office and District Railway." The defendants and the S. W. company divided the profits between H. and R. The plaintiff took from the clerk at R., there employed by the S. W. company, a return ticket to H. and back. The ticket was not headed with the name of either company, but bore on it the words "*Vid* District Railway." On his return journey from H. to R. the plaintiff travelled with his ticket in a carriage of a train belonging to the defendants, and under the management of their servants. The carriage being unsuited for the R. station platform, the plaintiff, on alighting there, fell and was hurt. In an action against the defendants *for breach of duty*, the jury found negligence in them. It was held that, having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, even assuming the ticket not to have been issued by or for them, but by the S. W. company. It was also held in the case, that even assuming that the contract was with the S. W. company, so that an action for damages under the contract would lie against them, yet that an action would as well lie against the defendants, whose acts caused the injury to the plaintiff; the defendants being liable, independent of express contract, for misfeasance, though not for non-feasance. The point is well illustrated by Lopes, J. (4 C. P. Div. at p. 282), thus: "Railway A. issues tickets for railway A. and railway B. The traffic is sometimes worked by carriages and servants belonging to railway A., and sometimes by carriages and servants belonging to railway B. A passenger takes a ticket from railway A. and gets into a carriage belonging to railway B., drawn by railway B.'s engines, and manned by railway B.'s servants. The passenger traverses some portion of railway B.'s line; an accident is caused by the negligence of railway B.'s servants, and through some defect in railway B.'s carriages not being properly adapted to the exigencies of the traffic. Now, although not necessary, perhaps, to go that length for the decision of this case, I think that, according to the authorities, the passenger could sue either railway A. or railway B. He could sue railway A. on the contract arising from the ticket issued by the company to carry him the whole distance with reasonable care or caution, or he could sue railway B. as the immediate authors of the negligence, on the implied contract or undertaking which would arise from his having been received into the carriage, or from his having been invited to go into the carriage of railway B. and become a passenger on the railway." The same ground is, in effect, covered by Bramwell, L. J., in the Court of Appeal (5 C. P. Div. at p. 159): "What was done or omitted was wilful. But the substance of the finding of the jury is that the carriage was dangerous with reference to the platform, or the platform with reference to the carriage, and that the plaintiff might and did reasonably act in the belief that they were not in that state, but safe for him to use; that, in truth, the combined arrangements were a trap or snare; so that, if he had been carried gratuitously as by a friend, he would have a right of action against him. With the

The following, under the English cases, are well-decided propositions of law in the matter: *First*, a railway company issuing a

ticket to a passenger for a journey partly on the company's own line and partly on the line of another company may be, and presumably is, responsible for the safety of the passenger on his whole journey, and is liable to compensate him for injuries caused to him by the negligence of railway servants or defective construction of carriages or stations, to whichever company they belong.[1]

propriety of so finding we have nothing to do. There was, according to that finding, a tort, whether in the defendants alone or in conjunction with the Southwestern does not matter, and the plaintiff is entitled to recover. But if the contract had not been a contract with the defendants, and all that could have been complained of was a non-feasance, I should hold they were not liable." In Marshall *v.* York, Newcastle, & Berwick Ry. Co., 11 C. B. 655, the declaration was, that the plaintiff, at the request of the defendants, became and was a passenger in one of their carriages, to be by them safely and securely carried and conveyed thereby, together with his luggage, on a certain journey along the said railway. The plaintiff's ticket had been taken by his master. The action was for loss of goods; and Jervis, C. J., in giving judgment, mentions the admission in argument that if, under the same circumstances, the plaintiff had sustained the loss of a limb or any other personal injury, he alone could have sued; and proceeds: "It is said that that is because the master could not maintain an action in respect of the personal suffering of the servant, though he might in respect of the loss of service. But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely. If, under the circumstances of this case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no reason why he should not also recover in respect of the loss of his luggage." And Williams, J., says (11 C. B. at p. 663): "The case was, I think, put upon the right footing by Mr. Hill, when he said that the question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railway company. His proposition was, that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward to be paid by the plaintiff, and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with Govett *v.* Radnidge, 3 East, 62, and ending with Pozzi *v.* Shipton, 8 A. & E. 963, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carriers." This case was approved by Blackburn, J., in Austin *v.* Great Western Ry. Co., L. R. 2 Q. B. 442, 445, where he says: "I think that what was said in the case of Marshall *v.* York, Newcastle, & Berwick Ry. Co., 11 C. B. 655, was quite correct. It was there laid down that the right which a passenger has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." In Gill *v.* Manchester Ry. Co., L. R. 8 Q. B. 186, the plaintiff desired to send a cow from D. to S., and took her to the station at D. belonging to the G. N. Co., where he booked her for S. by the defendants' railroad, signing a contract with the G. N. Co. exempting them from damage that might be occasioned by the restiveness of the cow. She was put into a truck belonging to the defendants, and on arriving at S. was brought to a siding by the defendants' yard for the purpose of being unloaded, in the process of which she got on to the line and was killed. By an agreement between the defendants and the G. N. Co. it was provided that a complete and full system of interchange of traffic in passengers, goods, etc., should be established between the two companies, with through tickets, etc., the stock of the two companies being treated as one stock, and the two companies assisting each other as if they were amalgamated. The court held that the action might be brought against either of the companies, and, therefore, that the action was rightly brought, inasmuch as the agreement, if it did not constitute a partnership between the two companies, showed that the G. N. Co. became the agents of the defendants to make the contract for the carriage of the cow, and that the condition in the contract did not relieve the defendants from liability for negligence on the part of their servants, causing the loss of the cow.

[1] Great Western Ry. Co. *v.* Blake, 7 H. & N. 987, 991; Thomas *v.* Rhymney Ry. Co., L. R. 5 Q. B. 226; L. R. 6 Q. B. 266.

Secondly, a railway company may under certain circumstances be subject, in favor of a passenger upon such a journey as last mentioned, to similar responsibilities, although, as between the company and the individual passenger, there may have been no contract; as, for instance, in the case of a servant travelling with his master upon a ticket taken by the latter;[1] or of a child of tender years travelling upon a ticket taken by its parent, and even in the case of a child above the age within which the company holds itself out as willing to carry children gratis, but taken by the mother without a ticket,[2] the responsibilities in these cases being not directly founded upon contract.

But, *thirdly*, the responsibilities of a railway company or any other carrier may be carried still a step further. There are cases in which a carrier may be liable for injuries received by a passenger when carried by him, although no contract for carriage may exist between the carrier and the passenger, or any person contracting directly for his carriage.

In Dalzell *v.* Tyrer,[3] the plaintiff had made a contract with a public ferryman under which the latter was bound to carry him daily for a certain period: the ferryman being unable, upon a particular day, to work the ferry, hired a boat and crew for the purpose, and an accident having occurred to the plaintiff through the mismanagement by the crew of a rope, the proprietor of the boat and crew was held liable to him.[4] So, again, a case of Reynolds *v.* North Eastern Ry. Co.[5] decided that where a passenger took a ticket of company A. for a journey over the lines of companies A., B., and C., and a collision having occurred on the B. railway by reason of the train in which the plaintiff was, running into trucks negligently left on the line, the B. company were liable to the plaintiff in an action of negligence.[6]

In Buxton *v.* The North Eastern Ry. Co.[7] the plaintiff was a passenger by the defendants' railway, to be carried from Y. to T. To reach T. it was necessary to travel over a line belonging to another company. While passing over this connecting line, the train in which the plaintiff was came into collision with a bullock, which had strayed on to the line from an adjoining field by break-

[1] Marshall *v.* York, Newcastle, & Berwick Ry. Co., 11 C. B. 655.

[2] Austin *v.* Great Western Ry. Co., L. R. 2 Q. B. 442.

[3] E. B. & E. 899.

[4] See also Waland *v.* Elkins, 1 Stark. 272; Fromont *v.* Coupland, 2 Bing. 170; Davey *v.* Chamberlain, 4 Esp. 229; Wheatley *v.* Patrick, 2 M. & W. 650; Dean *v.* Branthwaife, 5 Esp. 35; Sammell *v.* Wright, 5 Esp. 263; Houghton's Case, cited 5 B. & C. 550.

[5] C. P. 1868, *ex rel. amici.*

[6] Foulkes *v.* Metropolitan Ry. Co., 5 C. P. Div. 157, 169, *per* Thesiger, L. J. And see Great Northern Ry. Co. *v.* Harrison, 10 Ex. 376; Great Western Ry. Co. of Canada *v.* Braid, 1 Moo. P. C. N. S. 101; Thomas *v.* Rhymney Ry. Co., L. R. 6 Q. B. 266; Great Western Ry. Co. *v.* Blake, 7 H. & N. 987; Wright *v.* Midland Ry. Co., L. R. 8 Ex. 137.

[7] L. R. 3 Q. B. 549.

ing through the fence. The fence was in fact defective, but had been lately repaired, and was apparently in good condition. The plaintiff, being injured by the collision, sought to recover damages from the defendants. It was unanimously held, that the contract having been made with them, they were just as much liable for negligence happening on the one road as on the other.[1]

Showing how entirely the matter is one of contract, where[2] there was a clause in the defendants' contract of carriage exempting them from liability on the connecting line, although the jury found for the plaintiff, the verdict was set aside, and was entered for the defendants, pursuant to leave reserved.[3]

The principle of law[4] applicable to the contracts of carriers was applied in John *v.* Bacon,[5] under the following facts. A. agreed to carry B. from Milford Haven to Liverpool. The mode of transit provided was that B. should come on to a hulk lying in the harbor at Milford Haven, and wait till a steamer came and took him to Liverpool. On the hulk, close to a ladder down which B. had to pass to reach the steamer, was a large hatchway, which was negligently left unguarded and improperly lighted, and B. fell through it and was injured. The hulk belonged to a third party, and A. had only acquired a right to use it for the purpose of embarking passengers on his steamer. In an action by B. against A. for the injury he sustained, the court held, unanimously, that there was a contract by the defendant to carry the plaintiff from the shore at Milford Haven to Liverpool, and if so, it was part of that contract that due care should be used in the whole transit, and it was immaterial whether the defendant employed other persons to assist in the conveyance of the passengers. The passenger was entitled to the exercise of due care throughout. It is, in one sense, an impersonal obligation on the contracting carrier that due care shall be used in providing the means of transport, and in the management of them.

The same *principle of law* was applied in Francis *v.* Cockrell.[6] It was there held, that where a man causes a building to be erected

[1] Blackburn, J., said: "Where a railway company contracts with a passenger to carry him from one terminus to another, and on the journey the train has to pass over the line of another railway company, the company issuing the ticket incurs the same responsibility as that other company over whose line the train runs, and by whose default the accident happens, would incur if the contract to carry had been entered into with them."

[2] In Zunc *v.* The Southeastern Ry. Co., L. R. 4 Q. B. 539.

[3] And see Baxendale *v.* The Great Eastern Ry. Co., L. R. 4 Q. B. 244; Aldridge *v.* Great Western Ry. Co., 15 C. B. N. S. 582.

[4] See our comments, *infra*, on Gray *v.* Jackson, 51 N. H. 9, in which case the position is improperly taken that the question in all these cases is not one of law at all, but is purely one of fact for the jury.

[5] L. R. 5 C. P. 437.

[6] L. R. 5 Q. B. 184.

for viewing a public exhibition, and admits persons on payment of money, the contract between him and the persons admitted is analogous to the contract between a carrier and his passengers; and there is implied in such contract a warranty, not only of due care on the part of himself and his servants, but also of due care on the part of any independent contractor who may have been employed by him to construct the means of conveyance or support. Therefore, where the defendant, acting on behalf of himself and others interested in certain races, entered into a contract with a third party, who was a competent person to be so employed, to erect and let to them a grand stand for the purpose of viewing the races; and the defendant, on behalf of himself and his colleagues, received a fee, appropriated to the race fund, from every person admitted, the plaintiff being one of them; and the stand had been, but not to the knowledge of the defendant, negligently and improperly constructed, and in consequence fell and injured the plaintiff; it was held, that the plaintiff could maintain an action against the defendant for the damage sustained, although the defendant was free from all negligence, and had employed a competent person to erect the stand.[1]

The plaintiff, in Thomas *v.* The Rhymney Ry. Co.,[2] took a ticket of the defendants, a railway company, as a passenger from A. to C. At B., between A. and C., the defendants' line joins the line of the T. Company, over which the defendants have running powers from B. to C. on payment of certain tolls, the traffic arrangements being left in the control of the T. Company, and the station at B. belonging to the latter company, and being in their exclusive control. After leaving B., it being after dark, the train of the defendants in which the plaintiff rode ran into a train of the T. Company, and the plaintiff was injured by the collision. On the trial the jury found that the defendants' servants were guilty of no negligence, and that the collision was owing to the negligence of the servants of the T. Company in sending on their own train without the proper tail-light, and allowing the defendants' train to proceed on the same line of rails too soon after the other train without giving any warning to the driver of the defendants' train. On this finding the verdict was entered for the defendants, with leave reserved to enter it for the plaintiff if the court should hold that the defendants were liable[3] for the negligence of the T. Company. The Court of Queen's Bench having unanimously made absolute a rule to enter the verdict for the plain-

[1] And see Readhead *v.* Midland Ry. Co., L. R. 2 Q. B. 412; Great Western Ry. Co. *v.* Blake, 7 H. & N. 987.

[2] L. R. 6 Q. B. 266.

[3] Of course, *in law, on the facts.* See Gray *v.* Jackson, 51 N. H. 9, stated *infra.*

tiff,[1] on appeal to the Exchequer Chamber the judgment was unanimously sustained.[2]

[1] Thomas *v.* Rhymney Ry. Co., L. R. 5 Q. B. 226.

[2] The *principle of law* upon which the case was decided in the Exchequer Chamber is thus stated by Kelly, C. B. (L. R. 6 Q. B. at p. 273): "Where a railway company issues a ticket for a journey, in the course of which the train which conveys the passenger has to pass along a portion of a line of railway belonging to another company (whether it be under running powers or whether it be under any particular contract for a participation in profits or otherwise), the contract between the railway company and the traveller to whom such ticket is issued is *upon every principle of the law* a contract not only that they will not themselves be guilty of any negligence, but that the passenger shall be carried with due and reasonable care along the whole line from one end of the journey to another." The learned Chief Baron said further: "The case of Buxton *v.* Northeastern Ry. Co., L. R. 3 Q. B. 549, was cited among other cases. That case was tried before me; and there, although it was quite clear that the mischief complained of did not arise from the negligence of the defendants, but from the negligence of the Midland Railway Company, the owners of the intermediate portion of the line over which the traveller had to be conveyed, still it did not occur either to the counsel at the trial or to myself that that made any difference; and I am still of opinion, *upon every principle of law, justice, and reason,* when a ticket is issued, say, for example, at Euston Square Station, for the conveyance of a passenger to Edinburgh, or still further north, where the traveller may in the course of his journey have to pass over several lines of railway belonging to different companies, that the contract which was entered into by the company that issues the ticket is a contract that reasonable care shall be exercised by all by whom exercise of care is necessary for the reasonably safe conveyance of the passenger from one end of the journey to another. The company who issued the ticket received the entire consideration. It certainly appears to me to make no more difference that they are enabled to carry the passengers along a portion of the line under some arrangement with another company than if it were their own line, and a portion of it were kept in repair under contract with some persons who were in the habit, for a due consideration, of effecting repairs for railway companies, which certainly would not exempt the company from the obligations imposed on it. The only difference is that they perform some part of their contract by means of contracts or arrangements with other persons. The contract with the passenger is, as I have already observed, for the reasonably safe conveyance of the passenger from one end of the journey to the other. They receive the consideration or remuneration for the undertaking into which they enter, and it appears to me that, so far as anything that may come within (to adopt the expression which has been well used in the course of the argument) the compass of railway management, if in consequence of any negligence on any portion of the line, from one end of the line to the other, a mischief occurs to the passenger, he is entitled to maintain an action against the company with whom he contracted for his safe conveyance from one end of the journey to the other." Thomas *v.* Rhymney Ry. Co., L. R. 6 Q. B. at p. 273. But in Wright *v.* The Midland Ry. Co., L. R. 8 Ex. 137, the N. Company had statutory authority to run over a portion of the defendants' line, paying a certain toll to the defendants. The signals at the point of junction between the two lines were under the control of the defendants. Owing to the servants of the N. Company negligently disobeying these signals, a train of the N. Company ran into a train of the defendants in which the plaintiff was, causing him damage. There was no negligence on the part of any of the defendants' servants. In an action for injuries sustained, brought by the plaintiff against the defendants, it was held that he was not entitled to recover. In this case Cleasby, B., at p. 144 *et seq.*, distinguishes Thomas *v.* Rhymney Ry. Co., 6 Q. B. 266, on the ground that the railway ought to be in a reasonably fit state, free from obstruction so far as regards the management and care of the railway; but that the contract is not that the railway shall be in a reasonably fit state so far as regards the acts of third parties, whoever they may be, who, whether negligently or not, cause some obstruction, adding: "I cannot connect with the management of the railway something which is the direct effect not of defective regulations of the company, nor of any act to which they were parties, not of the neglect of some persons over whom they have no control whatever, and of whose services they do not make use." And see Readhead *v.* The Midland Ry. Co., L. R. 2 Q. B. 412. On the subject we are more particularly considering, Cleasby, B., says: "I quite agree that a contract for

Having thus exhaustively considered the English cases on the subject, we turn now to an examination of the decisions in this country.

It must be kept in mind that in all the English cases the question as to the liability of the contracting railway is simply treated

carriage from one place to another extends over the whole journey, whether upon the line of the contracting company or not; and, further, that it is the carrier's duty to use due and reasonable care during the whole journey. And I think that due and reasonable care extends to everything that is made use of by the contracting party during the course of that journey. For instance, as regards the construction of a railway, it embraces a contract that the rails themselves shall be in a sound and efficient state, so far as due care can make them so; and if they were worn out on a part of the railway not belonging to the contracting company, and which, therefore, they had not the power to repair, I agree that the decisions would establish that they would be liable for a want of care in those rails not being in a proper state if any damage was sustained thereby; and the same may be said if the switches or anything of that kind were defectively constructed, and if it were made out that in the course of a journey over the rails an accident arose from that defective construction. So, again, as regards persons employed by the carrying company or made use of by them. The management of the stations, for example, is in the hands of certain persons; certain regulations are made; and I will suppose that whilst the regulations are proper and sufficient the persons who are entrusted with the duty of enforcing them, as in the Rhymney Case, fail to do so, and an accident occurs in consequence. In such a case the contracting company in performing their contract make use of those persons, and although the arrangements at the station may be in other hands, still the carrying company would be responsible. That seems to me consistent with reason, and certainly is consistent with the authorities that have been referred to. It is consistent with the Great Western Ry. Co. *v.* Blake, 7 H. & N. 987, where the decision is put upon the footing of there being neglect in allowing that to be upon the line which ought not to be there, and it is also consistent with Thomas *v.* Rhymney Ry. Co., L. R. 5 Q. B. 226. In the latter case I was a party to the judgment in the Exchequer Chamber, and acquiesced in it upon the ground referred to in that passage which occurs in the Lord Chief Baron's judgment (at p. 274), where he puts the case as one of negligence in something connected with the management of the railway during the journey on which the accident took place." Wright *v.* Midland Ry. Co., L. R. 8 Ex. at p. 144. This case is distinguished from those for the carriage of goods, for there the carriers are liable as insurers. But in the case of the carriage of passengers, the contract is that all persons connected with the carrying, and with the means and appliances of the carrying, with the carriages, the road, the signalling, and otherwise, shall use care and diligence so that no accident shall happen. But they contract no further. They have no contract or duty that strangers to the railway, or persons who have occasion, and who lawfully may use the line, shall not be guilty of any negligence or misconduct. *Per* Bramwell, B., *Ibid.*, at p. 140. And see Readhead *v.* Midland Ry. Co., L. R. 2 Q. B. 412.

Hall *v.* Northeastern Ry. Co., L. R. 10 Q. B. 437, was something like Bristol & Exeter Ry. Co. *v.* Collins, 7 H. L. Cas. 194, *supra*. But instead of the condition exempting from loss applying only to the line of the contracting company, as in this latter case, in this case it was properly held to be a part of the entire contract, and applicable to the entire route. The plaintiff was in charge of a quantity of sheep shipped at Angerton, Scotland, for Newcastle, England, by the North British Railway Company under a through contract. The line only extended to Morpeth, where it connected with the defendants' line, at which point the cattle-trucks and the carriage in which the plaintiff was, were attached to the defendants' train. The plaintiff was travelling under a free pass over the whole route, the pass being issued under the condition that he agreed to travel at his own risk. But for this he would have had to pay fare as a passenger. After leaving Morpeth the train in which the plaintiff travelled was run into by another train, owing to the negligence of the defendants' servants in charge of the other train, and the plaintiff received injuries from the collision. On the trial the jury found for the plaintiff; but pursuant to leave reserved the verdict was reversed, the Court of Queen's Bench unanimously holding that the contract was an entire one for the whole route, which protected both companies. See Carr *v.* Lancashire & Yorkshire Ry. Co., 7 Ex. 707.

as matter of contract, and the railway is held liable or not liable for a loss caused by a connecting railway, just as a fair construction of the contract will show whether or not the contract of the receiving railway extended to the carriage beyond its own immediate line. Thus, in Gilbert *v.* Dale,[1] Syms *v.* Chaplin,[2] and in Garside *v.* The Trent Navigation Co.[3] (stated *supra*, p. 76 *et seq.*), the contracts all showed that the liability did not extend beyond the immediate line of the receiving railway or contractor, and the courts in these and other cases stated by us (*supra*) so held. On the other hand, in Muschamp *v.* Lancaster Ry. Co.,[4] the railway receiving the goods to be carried an entire distance at one through rate, no limitation on their undertaking being expressed or implied, it was held, very reasonably we think, that this was *primâ facie* evidence of an undertaking of that company to carry the goods to the place of their destination. The court so charged and the jury so found; both the charge and finding being sustained unanimously by the full court.

We think a careful perusal of the English cases, as we have fairly presented them, will show that there is no antagonism in principle between these cases, although it has been thought otherwise in this country.[5] In all of these cases the question was treated as one of fact, the construction of the particular contract depending on the particular facts connected with it. We think the misapprehension on this point that has largely existed in this country has led to a fancied difference between the English and many of the American decisions in cases where no such difference really exists.

The statement of what is sometimes called the English rule in the matter is, as will be seen by our very full analysis of the English cases, simply absurd. Thus Redfield, in his Carriers,[6] states the so-called "rule" absolutely, without any exception or qualification, and utterly irrespective of what the contract in the particular case is, by the facts, shown to be; that "where the loss is shown to have occurred upon one of the subsequent roads in the route, it is held that the contract is exclusively with the first company, and that there is no right of action against any of the subsequent companies on the route."

It is scarcely necessary for us to say, after the full statement of the English cases which we have made, that this is entirely incorrect, or, to say the very least, is greatly misleading. The case cited for this proposition is Bristol & Exeter Ry. *v.* Collins.[7]

[1] 5 A. & E. 543.
[2] 6 A. & E. 634, 643.
[3] 4 T. R. 581.
[4] 8 M. & W. 421. See *supra*, p. 78.
[5] See Redf. on Car. § 181, distinctly so stating.
[6] § 180.
[7] 7 H. L. Cas. 194.

But while, as we have shown, we think the decision in that case, on the construction of the contract involved in it, one of the greatest doubt,[1] the unanimous judgment of the Exchequer Chamber and the answers of four of the six judges who were called in being adverse to the decision; yet it was simply a question on the facts of the case as to whether the contract of the receiving company was to carry over the entire route or not, and it was held, improperly we think, that, under the facts of the case, it was. But, as we have shown, the whole case clearly shows that if the contract had appeared more clearly, so that it would have been "incapable of being misunderstood," as Lord Cranworth expressed it, that it was a contract by the receiving railway to carry only over their own railway, and then to deliver merely to the connecting railway to be forwarded, this latter railway would have been liable.

The misapprehension of Redfield is even more clearly seen in section 181 of his Carriers, where he says that the rule laid down in the earlier English cases is, "that the carrier is only liable for the extent of his own route, and for the safe storage and delivery to the next carrier." There are no English cases, either early or late, which lay down any such rule as this. The cases, as we have shown, all put it simply as a question of what the contract is in the particular case.

The only case cited by Redfield, J., for the latter of his propositions is Garside *v.* Trent & Mersey Navigation Co.[2] But that case, as we have shown, was simply one of contract, and that, too, an express one, by the receiving company to carry the goods from Stourport to Manchester, and then to *forward* them from Manchester to Stockport; and it was, clearly, correctly held, under that contract, that the liability of the receiving company as a carrier ended at Manchester. This case, so far from laying down a different rule from that in Bristol & Exeter Ry. *v.* Collins,[3] is in perfect harmony with it. The doubt in this latter case, which, we think, under the facts, was not well founded, was as to whether that portion of the way-bill which it was held showed a contract to carry the entire distance was modified or qualified by other parts of it, so as to make out that it was such a contract as existed in Garside *v.* Trent & Mersey Navigation Co.,[4] and, with a very great deal of doubt and difference of opinion, it was held that it was not. But if, as in this latter case, it had sufficiently appeared to the House of Lords, as it did to the Exchequer Cham-

[1] Each of the four Law Lords who decided the case, himself, on one ground or another, casting doubt on the case.

[2] 4 T. R. 581.

[3] 7 H. L. Cas. 194.

[4] 4 T. R. 581.

ber, that the contract of the receiving company was to carry the goods over their portion of the route only, and to deliver them to the connecting company, to be forwarded to the ultimate destination, then, in perfect harmony with Garside *v.* Trent & Mersey Navigation Co.,[1] it would have been held by the House of Lords, as it was unanimously, and, we think, correctly, held by the Exchequer Chamber, that the connecting company was liable for the loss of the goods, as carriers, while in their possession; and that, again differing with Redfield on Carriers,[2] their common-law liability for such loss was not affected by the clause in the contract exempting the receiving company from a loss of the same character.

The same mistake as to the effect of the English decisions, made by Redfield in his Carriers, is repeated, *verbatim*, in his Railways.[3]

In another American work on Carriers,[4] it is more correctly stated, that "Carriers may frequently become forwarders only when the goods are consigned to points beyond the *termini* of their own lines; and it frequently becomes difficult to determine whether, under the particular circumstances of the case, they should be held liable for the safety of the goods throughout the whole line of transit to destination, though extending beyond the termination of their routes; or whether, having transported them as far as their routes extend, and there having safely delivered them to another connecting carrier to complete the transportation, they are not to be considered as having acted as forwarding agents merely as to such further carriage, and therefore no longer responsible. It is well settled, however, that the carrier may contract to carry to a point beyond the terminus of his own line so as to become liable for the delivery at such point, and that the liability thus attaching at the commencement will continue throughout the whole transit. And when he has thus undertaken for the transportation of the goods throughout to destination, all connecting lines of carriers employed in furthering and completing such transportation become his agents, for whose defaults he becomes responsible to the owner of the goods."

This is stated as the general common-law rule, and while, as far as it goes, it not inaccurately states the law as we have shown it to be settled in England, and is very far from being in accord with the manifestly incorrect statement by Redfield, in his works on Railways and Carriers, numerous American cases are cited to show that this is the well-settled law here, although a very differ-

[1] 4 T. R. 581.
[2] § 180.
[3] Vol. ii. 129–132, 6th ed.
[4] Hutchinson, § 145.

ent impression is conveyed of the law in this country by the statements of Redfield in the context to those passages which we have quoted from his works on Carriers and Railways.

We find that Hutchinson, in referring to the holding in Muschamp *v.* The Lancaster & Preston Ry. Co.,[1] makes a statement which, on its face, goes far to show the correctness of the English decisions. The reference by Hutchinson[2] to which we have alluded, is as follows: "This rule has been ever since adhered to without question or dispute by the English courts, and no principle is better settled in that country than that which obliges the carrier, WHEN HE ACCEPTS GOODS FOR TRANSPORTATION, *the destination of which is one to which he himself does not carry because off or beyond his own route*, to nevertheless take upon himself the responsibility for both the carriage and the safety of the goods to destination; and if they be lost upon the route, no matter by whom, he becomes liable to the owner for the loss, unless he has protected himself against such liability by contract."

In the most of the English cases a traffic receipt or way-bill is signed showing the destination of the goods, but whether this is done or not, where the company expressly (as it does in many of the English cases) receive the goods for transportation to a designated place, and at a fixed rate for the whole route, the English cases clearly hold that this, when not otherwise qualified, *primâ facie* implies a contract by the receiving company to transport the goods to the designated place for which the round sum is charged.

Now, suppose a traffic receipt, way-bill, or bill of lading, as the instrument is indifferently called, is so signed for the conveyance of goods to a designated place *off* a railroad route altogether, and for which one entire sum is paid, surely that as much makes a contract by the company to deliver the goods to the named destination, as though such destination were on its line of railway. And that, in principle, is all that the English cases hold.

Whether the facts of the receipt of the goods for transportation to a designated place, and the one charge therefor, whether paid at one end of the route or to be paid at the other being immaterial, appear by the actual acceptance of the goods subject to such a charge, or by statement in a way-bill or bill of lading, is simply a matter of the mode of proving the contract; but by no means changes the nature of the contract.

What, on the face of the contract, is its nature? Is it not, that the goods are to be carried to the designated place, for which the one round sum is to be paid? And if so, who are the parties to

[1] 8 M. & W. 421. [2] § 147.

the contract? Is it not self-evident that they are the shipper and the receiver; no other party being named, or in any way made a party to the contract? If the receiver obtain the goods for conveyance to a designated place for a round sum of money, is he not *primâ facie* the contractor to do so; and, if he wish another to share his liability, must not that be made a specific part of the contract, in order to affect the shipper, the other party to the contract? We can see no reason in the world for thinking otherwise, and therefore, see no reason for questioning the soundness of the unbroken series of English cases which so decide; the receipt of the goods marked to a designated place being some evidence (*primâ facie*) of such a contract.

Before examining some of the American cases, we would point out and correct an error into which Hutchinson has fallen. He says: "And not only does the first *or contracting carrier* [mark! "*contracting* carrier!"] become liable, no matter by whom the goods may be lost, but it becomes exclusively responsible and can alone be sued by the aggrieved party; and any attempt to hold the subsequent or connecting carrier liable for the loss, although it may have occurred from its negligence *or fault*, must fail for the want of privity of contract between such carrier and the injured party." This is inaccurate. Although the shipper cannot recover on the contract, against the connecting carrier unless as a partner,[1] or otherwise, for instance as principal, he is a party to the contract; yet, as the English cases manifestly show, as we have pointed out,[2] where the "fault" is one of misfeasance, the subsequent or connecting carrier is also liable. And, in this case, the party aggrieved has his remedy against the party with whom he contracted under the contract, or against the party doing the wrong, for the wrong done. We think this principle is thoroughly correct, assuming, as we think, as a matter of law, we are bound to do, that it is only the party contracting who is liable on his contract; that, as far as the matter lies in contract, the remedy under the contract is against the contracting party; where it lies in tort for a wrong done, independent of contract, then there is a remedy against the wrongdoer for misfeasance.

Redfield, in his works on Carriers[3] and Railways,[4] says: "The

[1] "Sometimes the arrangements of adjoining routes have been held to constitute a partnership; as where they have put their earnings into a common fund, and divided it according to the length of their respective lines, under such an agreement as appeared in the case of Champion *v.* Bostwick, 18 Wend. 175. Or if they have jointly employed an agent, although they were not partners in other respects, they have been held jointly liable for his misfeasance. Cobb *v.* Abbot, 14 Pick. 289. Darling *v.* Boston & Worcester Rd., 11 Allen, 296. And see the Irish cases stated *supra*, p. 87 *et seq.*

[2] See *supra*, p. 88 *et seq.*

[3] § 181.

[4] Vol. ii. p. 131, 6th ed.

general view of the American courts upon this subject is that in the absence of special contract, the rule laid down in the earlier English cases, that the carrier is only liable for the extent of his own route, and for the safe storage and delivery to the next carrier, is the more just and reasonable one, and this is the doctrine which seems likely to prevail in this country, although there is no doubt some argument to be drawn from convenience in favor of the English rule."

We have already pointed out that there is no difference whatever upon the subject between the early and late decisions in the English courts, but that, in all of them, it is simply a question as to what is the express or implied contract in the particular case. The phrase, "*special* contract," used by Redfield, and which is found repeated in a great number of the American cases in the most uncertain, indefinite manner, is itself, in this connection, inaccurate, or meaningless. Contracts are express or implied, and a contract, or "special" contract (which, in this connection, really means nothing more than a contract) may arise from the expressed agreement of the parties, or may be implied from the circumstances connected with the case. But the phrase in connection with the contract of a carrier to deliver goods at a point beyond his own particular route, that he is not bound to do so "except by *special* contract," while we believe it has led to many incorrect decisions in this country, and is stated to be the American rule, seems to mean, as far as any sense at all can be made out of it, not that the contracts of carriers to so bind them must always be *express* contracts, but while such contracts may be implied in some cases, it will not be implied, simply because the carriers receive the goods for shipment marked for a designated place, that they thereby contract to carry and deliver the goods to that place; particularly, it appears, if that place *happen to be beyond* their own particular route. But it is evident that if they receive goods deliverable at a point, as designated by the address, on or within their own particular line or limits, it is clearly implied, — particularly, as they invariably do in such case, if they receive pay for the entire distance, — that they contract to carry and deliver the goods to and at that designated place; then, why may it not also be implied that they contract to carry and deliver goods so designated by the address on the goods which they receive for conveyance and delivery to the place designated by the address, even though that point be at a place beyond their own immediate line or limits (but which fact may be entirely unknown to the shipper), particularly, as they so often do, if they receive pay for such carriage for the entire distance?

All that the English cases hold is that, *primâ facie*, when they receive goods for shipment and carriage which are addressed to a particular place, this is *evidence* of their impliedly undertaking to carry them to that place, where their regular business is that of carriers; and that this implication is strengthened when, without question or explanation, the carriers receive goods for carriage on which their proposed destination is designated by the address, and receive pay for their conveyance for the entire distance.

But, on the other hand, when, as in such a case as Upston *v.* Clark,[1] followed and approved by Gilbert *v.* Dale,[2] goods so designated by address are delivered to parties merely for booking and forwarding, for which a small sum only is paid; or, as in Syms *v.* Chaplin,[3] and Garside *v.* The Trent Nav. Co.,[4] goods are expressly received by carriers to be conveyed a certain distance and then forwarded, no such implication arises; and, under such facts, there is not even *primâ facie* evidence of any responsibility beyond the limits within which, impliedly or expressly, the responsibility is confined.

So, again, as in the case of Scothorn *v.* South Staffordshire Ry. Co.,[5] under the original contract, where the goods were to be delivered to the ship Melbourne expressly, though they were intended to go by her to Australia, the liability of the carrier terminated at the ship, as there was not, in that case, anything expressly or impliedly to carry it further.

We think that not a little confusion has arisen in many of the cases in this country — as clearly has been the case, as we have shown, with Judge Redfield in his works on Carriers and Railways — from the misapprehension of what the English cases really hold on the subject. Let us illustrate. Suppose A., who has been in the habit of purchasing goods on credit at the store of B., goes into the store, and asks a clerk for an article of goods, asks the price of it, and takes it away with him without paying for it, and saying nothing further; in an action against A. for the price for goods sold and delivered, the court, on such facts, could properly tell the jury that this was a *primâ facie* case against A. for goods sold and delivered. But if A. showed in answer that it was not a sale at all, — that he simply got the goods under the order and for the use of B. himself, and that he used them for B.; or that he had got them for C., who had borrowed them from B., and that he had delivered them to C., — the evidence of a sale

[1] 2 C. & P. 598.
[2] 5 A. & E. 543.
[3] 6 A. & E. 634.
[4] 4 T. R. 581.
[5] 8 Ex. 341.

and delivery, *primâ facie*, would be overborne. Or, again, if a collector and deliverer of parcels, whose business was, and was generally known to be, the collection and delivery of parcels in a city only, received for delivery a parcel addressed to a place within the city, *primâ facie* this evidence would show an implied contract by him to deliver the parcel to the place of its address, and so, clearly, the court would be justified in directing a jury. But, in such a case, if he received a parcel addressed to a remote place, far removed from the city, and addressed also, "*Per* Wells, Fargo, & Co.'s Express," which had one of their offices in the city, and he delivered the parcel to the express office, this would be like the booking cases in England, and there the facts would not show a case from which even *primâ facie* it could be implied that he had contracted to carry, or be responsible for the carriage of, the goods to the remote place; more particularly if, as in such a case he would do, he received payment only for the carriage and delivery to the express office.

Again, if, instead of the delivery of a parcel to a regular parcel collector, a parcel, addressed to a particular place in a city, were delivered to a post-office collector of letters and parcels through the city, whose business was, and was known to be, merely to collect them and take them to the post-office for distribution, there then could be no room for an implication that there was any other contract or duty on the part of the carrier than to take the parcel to the post-office. Or, again, if a local expressman, in the habit of collecting parcels, trunks, goods, etc., for delivery to different railways and canals, collected articles addressed to various remote places, and addressed *via* different routes, or *per* different railways, etc., and delivered them to go as addressed, no implication could arise that he had any further responsibility for their delivery at their ultimate destination, particularly if in such case he only received, as he would only be legally entitled to receive (if the question came up in that shape), payment for delivery within his own clearly implied limits, which terminated at the railways and canals.

But, once more, if a railway itself employed a team at a town remote from its own line of railway, and collected goods, parcels, etc., addressed for delivery (that is what an address means) to places along their line of railway, and without anything further to show a contract, "special" or *general*, — if there can be any such distinction as that in connection with contracts, — there a judge could fairly direct a jury that this was *primâ facie* evidence for them, and a jury could fairly find that that did imply that the railway contracted to transport the goods, not only along their

line of railway, but from the remote towns where they had collected the goods to their line of railway. And if they received payment for the whole route, including the portion of the route from the town to the railway, — as, if the question came up in that way, they would be clearly entitled to do, — that would go still farther to show the entirety of the contract.

In the same way, if a railway received for carriage goods at one of its stations, addressed for delivery to another station along its route, then it would clearly be implied — the receipt for carriage of goods so addressed *for delivery* clearly implying that — that they contracted to deliver the goods at the station "specially" or specifically designated in and by the address; and in a suit for the freight from the point at which the goods were received to that where they were delivered, the matter of the address on the goods would be a material item in the evidence; the fact that the goods were addressed for a specific place implying clearly that it was the intention of the sender to have them delivered there.

Precisely so, then, where goods are received by a railway, addressed for delivery to a point which may or may not be, for aught the shipper may or may not know, on or off their own immediate line or extent of railway. It is quite competent for the railway to contract to carry beyond its own immediate line of railway.[1] If, then, they expressly contract to do so by way-bill, freight receipt, or bill of lading, they are clearly bound by their contract; why may they not as well be bound by facts from which such a contract may be implied? Clearly they may. The very form of the interrogatory proves it. A contract, or "special" contract if you will, may as well be raised by language and facts which imply the particular (or "special") contract, as by language alone which expresses it.

As to the language and facts from which such a contract may be implied, that is a matter of construction. The receipt for carriage and delivery by a railway, which may contract, and which does very often expressly contract, to carry and deliver goods to places which, as far as the shipper is concerned, may or may not be on their own line, or strictly within "the extent of their own railway," of goods addressed for delivery to a designated place, is surely some evidence (and if so, is *primâ facie* evidence, *so far as it goes*) of an undertaking by them to deliver the goods to that expressly designated place for delivery. Such evidence, accord-

[1] This is questioned by a few of the cases in this country, limited principally to some extremely doubtful cases in Connecticut; but the overwhelming weight of authority both here and in England is that they are so competent; a position, the soundness of which, we think, will scarcely now be doubted.

ing to the accompanying facts and circumstances, may or may not be very strong, but it is at least some evidence of such an undertaking.

This is the whole effect of the ruling of Rolfe, B., in Muschamp *v.* Lancaster Ry. Co.[1] The learned judge there directed the jury, that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applied although that place were beyond the limits within which he in general professed to carry on his trade of a carrier. This ruling was unanimously sustained by the Court of Exchequer, on the ground that the carriers had "accepted a parcel to be carried on to a more distant place" than their own route, and that their acceptance of it was "evidence whence the jury might infer that they undertook to carry it in safety to that place."

As it was merely *primâ facie* evidence, so far as it went, of a contract to carry it the entire distance, obviously such *primâ facie* evidence would be strengthened or weakened by such other evidence as might be given in the case. The additional material items of the evidence in this case were that there was to be but one round sum paid for the whole railway carriage by the person to whom the box was addressed, who "would be ready at the other end to receive it," where the carriage was to be paid. The box was lost before it reached the terminus of the connecting railway. Had the charge for the carriage of the box been but for the portion of the route traversed by the receiving railway, the mere implication derived from the address of the box would have been necessarily weakened; but, instead of that, the fact that the freight was to be for the carriage for the whole route to the point at which the box was to be delivered to the party who was to be there to receive it, added to the strength of the evidence, and, we think, fully sustained the finding of the jury; which finding, as well as the direction of the judge on the trial, was unanimously affirmed by the full court. After this very full consideration of that which is involved by what has been decided by the English cases, we now examine the American cases, commencing with those which are usually stated as holding a doctrine opposed to Muschamp *v.* Lancaster Ry. Co.,[2] and the others of the unbroken series of English cases which are in accord with it.

The cases in Massachusetts are usually among those cited as establishing a different principle from that which is held in the

[1] 8 M. & W. 421. [2] *Ibid.*

English cases. Nutting *v.* Connecticut River R. R. Co.[1] is one of these. It also is one of the cases where such language appears as that "each carrier is bound only to the end of his route, unless he makes a *special* contract that binds him further." If he make a "contract" at all which "binds him further," he is clearly "bound;" and this, as we have seen, and as hosts of the cases which use such language as that in 1 Gray, 502, clearly show, he may do, either expressly or impliedly. So, what is here meant by a "special" contract is rather uncertain. But in Nutting *v.* Connecticut River R. R. Co. there was a *written* contract in which the defendants admitted that they received the goods "for transportation to New York." So, the question for the court, as far as the contract was involved, was as to the proper construction of the written contract, — of course in the light of the surrounding circumstances. If by receiving the goods for transportation (meaning carriage) it was meant that they "*bound*" *themselves by contract*, or contracted, to carry them to New York, then, under their express contract, they were "bound" to so carry or transport them, and there was an express contract to carry them to New York. If by their contract they had agreed to *deliver* them at New York, they would clearly have been bound to deliver them there, notwithstanding carriage or transportation over another line was involved. If their undertaking for their "transportation" to New York amounted to this, then there was a contract (or "special" contract, if it be preferred) for the delivery of the goods there.

But the head-note of the case is, "A railroad corporation *receiving goods for transportation to a place*[2] situated beyond the line of their road, on another railroad which connects with theirs, but with the proprietors of which they have no connection in business, and taking pay for the transportation over their own road only, are not liable, in the absence of any *special* contract, for the loss of the goods after their delivery to the proprietors of the other railroad." And not only this, but in addition to "taking pay over their own road only," and having "no connection in business" with the proprietors of the road on which the goods were lost, it appears from the facts that, at the termination of their road, the goods were formally delivered to the agents of the other road, by whom they were "overhauled and checked." So, here a very different state of facts is presented from that in Muschamp *v.* Lancaster Railway.[3] And the implication arising in a

[1] 1 Gray, 502.

[2] If their contract is to do this, how can they say, unless there is some express or implied limitation on such a contract, that they are not "bound" to perform it.

[3] 8 M. & W. 421.

case where goods marked for a specified place were received for "transportation" or carriage, and there, too, where the charge for carriage over the whole route is in one sum, may be very different from what it might be in such a case as Nutting *v.* Connecticut River R. R. Co.[1] So that, in this case, a dissent from what is stated to be *primâ facie* implied by undertaking the carriage of goods marked for a specified place, as in Muschamp *v.* Lancaster Railway, was unnecessary, and the actual holding in the one case is by no means opposed to that in the other.

The cases of Thomas *v.* Boston & Providence R. R. Co.[2] and Norway Plains Co. *v.* Boston & Maine Railroad[3] were cited in Nutting *v.* Connecticut River R. R. Co., but they are not decisions on the point involved, but on the collateral question of a carrier's liability becoming that of a warehouseman, after the *transitus* with him has ended.

So Judson *v.* Western R. R. Co.[4] simply holds that a railway company was not liable for the loss of goods before the *transitus* had commenced; having been holders at the time merely as warehousemen and not as carriers.

In the case of Lowell Wire Fence Co. *v.* Sargent,[5] the question did not arise with reference to the loss of goods, but rather as to the nature of the contract of an expressman who receives a bill for collection at a distant place; the goods for which the bill was to be collected being forwarded at the same time. But the statement of the law in this case, as far as it is applicable, is not at all inconsistent with the holding in Muschamp *v.* Lancaster Railway,[6] that where a railway receives goods for carriage, marked for delivery to a designated point, this is evidence for a jury from which they may infer a contract on the part of the railway, so receiving the goods, to carry and deliver them to the designated point. The error that is so often made in the matter is in treating it as though it were held that such evidence is conclusive evidence, instead of being, as one significant fact in the matter, merely *primâ facie* evidence.

The whole trend of the English cases from Upston *v.* Clark,[7] down to the very latest case on the question, is not inconsistent with the following from the Massachusetts court:[8] "There was no express contract in relation to the transportation of the fence; and whether the implied contract was to carry it to Annapolis, or merely to carry it to Boston, and forward it thence by the

[1] 1 Gray, 502.
[2] 10 Met. 472.
[3] 1 Gray, 263, 270.
[4] 4 Allen, 520.
[5] 8 Allen, 189.
[6] 8 M. & W. 421.
[7] 2 C. & P. 598.
[8] In Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189.

ordinary lines of transportation, was certainly a question for the jury upon the whole evidence in the case; in determining which they would consider the nature of the business, the advertisements or notices given by the defendants, and all the circumstances tending to show the understanding of the parties. It was therefore properly left to the jury; and we can see no reason to think that they came to a wrong conclusion upon the evidence reported." And even if the fence had been lost, and the action had arisen out of that, it would still have been "a question for the jury, under the directions of the court, upon the whole evidence in the case" as to what the contract between the parties was. In this case there were not only the circumstances alluded to by the court, for consideration; but there were the further facts that the defendants' *transitus* ended in Boston; that they there delivered the fence and bill over to other forwarders, taking a receipt therefor; and that they received payment for the freight only to Boston.

Evidence of such facts as these was given in the Irish cases, cited by us *ante*, p. 86 *et seq.*, which professedly followed the English cases; and is clearly in accordance with the spirit of the English cases as well, and would be matter from which a jury could well infer, that, as the contract of the express company was not exclusively governed by the fact that the fence was addressed to Annapolis, a more limited contract than that they were to deliver it there, and be responsible for the amount to be collected there for its payment, might, from all the circumstances of the case, be implied.[1]

In Darling *v.* Boston & Worcester R. R. Co.,[2] it is said that, "In the absence of any usage or *special contract*, a carrier is bound to carry goods only upon his own route, and then deliver them to the consignee *designated by his employer*. If there is a usage or contract by which he is to deliver them to another carrier to be transported further, he discharges his duty by delivering them in good order and with proper instructions to that carrier. Such a usage may be proved in order to show what his duty is."

Garside *v.* Trent & Mersey Nav. Co.,[3] and Hyde *v.* The Nav. Co.,[4] are cited as authorities for this. If here, by the rather uncertain term "*special* contract" is meant *express* contract, and that it may not be implied, from the circumstances of the case, that a carrier has contracted to carry goods to a designated point for which the goods are marked, — this fact being

[1] See the language quoted by us *ante*, p. 78, from the judgment of Lord Abinger, in Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421, quite consistent with this.

[2] 11 Allen, 295.

[3] 4 T. R. 581.

[4] 5 T. R. 389.

itself some evidence of such an implied contract, — even though that point may be beyond or outside of his own immediate line; then, neither the English cases cited, nor any other English or well-decided American case either, can sustain such a position; as it is radically unsound and is entirely unsupported by any English case that can be named. But, in the case above put by the Massachusetts court, if the goods have been delivered by the carrier "to the consignee designated by his employer," then it would seem, on the very face of the proposition, that the carrier, in so delivering the goods, had complied with the express terms of the contract.

What the court really mean by their use of the term "special contract," is made still more uncertain by their using[1] the term "express" as, apparently, a convertible term for "special," and then, by the subsequent use, in the same paragraph, of the term "express or implied" plainly showing that they mean nothing of the kind. What they do mean by the language they employ, it is absolutely impossible to tell. Thus they say: "But the convenience of commerce makes it highly useful to send goods to distant places which can be reached only by several connecting but independent lines of transportation. It is important that this business should be accommodated; and this may be done either by *express* (!) agreement or established usage. It is frequently done in this country by express arrangement made by the proprietors of the connecting lines with each other, and this is much better than to leave any important matter of this kind to be settled by proof of mere usage. . . . And in construing the agreements, *express or implied* (!), all that is necessary is that they should be reasonably clear."

If by all this is meant that a railroad can be made liable only on a contract to carry goods beyond its own line, by an "express," or as they so often call it, a "special" contract, it is simply nonsense. If, on the other hand, they admit that such a contract may be either express, or implied from the facts, as in the latter part of the paragraph they, in express terms, virtually do, then they admit exactly what is held by the entire series of English cases, early and late, on the subject.

But the court go on farther, to say: "Where a carrier takes goods that are to be carried to a distant point beyond his line, and must pass over several intermediate lines, his employer finds it necessary to make some arrangement for the payment of freight and the transportation of the goods over each line. For none of the intermediate carriers are bound to transport the goods till

[1] On p. 296.

they are paid for it, nor are they bound to deliver them to the next carrier without directions, express or implied. *The carrier may become liable to his employer for transporting them over every line to the place of their destination.*[1] [Precisely so, hold the English cases.] The English courts have held that the first carrier is thus liable unless he makes an express limitation of his liability." No authority is cited for this, and, as we have very fully shown, it is an utterly inaccurate statement of the *ratio decidendi* of the English cases.

But, we find that all we have quoted from Darling *v.* Boston & Worcester R. R. Co.,[2] and very much more to the same purport, is simply *obiter dicta*. In the case the claim was not against the company which received the goods (doing so, too, under an express written contract), but against the ultimate connecting company, for an injury happening to the goods before they received them, and, under the state of facts in the case, it was held, — a matter entirely too clear for question, — that they were no parties to the original contract, and were not liable for injury to the goods not caused by themselves. The only ground, apparently, on which it was sought to hold them liable for such damage was that they had paid the freight on the goods to the point at which they received them, but there was nothing in that fact from which it could be implied that they were liable for such damage. And this case is one of the principal cases cited *ad nauseam* by courts and text-writers to establish that the doctrine of the English decisions on the subject cannot be sustained!

Another of those cases is Gass *v.* New York, &c. R. R. Co.[3] Here again, the action was not against the company which received the goods from the shipper, but against a connecting company, and it was held that the connecting company was not liable for the loss of goods destroyed while in the possession of the first company; the facts neither showing a partnership between them, nor an agency on the part of the first company to bind the second company for a loss of goods happening before they reached the possession of the latter company; the principle on which the case was decided being that very simple one that when goods are delivered by one carrier to another, it is evident that the liability of the second commences only when that of the first terminates.

In Burroughs *v.* Norwich & Worcester R. R. Co.,[4] the term "positive" is substituted for their usual "special;" thus: "The

[1] Najac *v.* Boston & Lowell R. R., 7 Allen, 329.
[2] 11 Allen, 295.
[3] 99 Mass. 220.
[4] 100 Mass. 26.

law is well settled in this Commonwealth, and in most of the United States, that a corporation established for the transportation of goods for hire between certain points, and receiving goods directed to a more distant place, is not responsible beyond the end of his own line, unless it makes a *positive* agreement extending its liability."

The Massachusetts cases cited for this are those which we have examined. A contract, whether it be called "special" or "positive," can be made *expressly*, or it may be *implied* from circumstances. This is the general rule as to contracts, and there is nothing in the position of a common carrier to take his contracts from out this rule. Besides his liability on contract, express or implied, a common-law liability, independent of or not strictly based on contract, sometimes attaches to him. But the English cases on this subject, not dealing with this common-law liability as a carrier, simply hold that he is liable, in this class of cases, on his contract, express or implied; and so far none of these Massachusetts cases really controvert this position.

It is, as is usually the case with the construction of implied contracts, a m tter of mixed law and fact as to the circumstances from which such a contract may be implied; but, so far, none of those Massachusetts cases touch this question at all. Thus, in this case last cited it is said: "The English cases in which a station agent has been allowed to bind the corporation by a contract to carry beyond its own line are of no weight in this case; because the law of England does not make the distinction which our law does between goods which are and goods which are not addressed to a place beyond the corporation's own line, but holds that in either case the corporation is liable as a common carrier to the ultimate destination."

On the contrary, the English cases hold, as in Upston *v.* Clark;[1] Gilbert *v.* Dale,[2] Syms *v.* Chaplin;[3] Garside *v.* The Trent Nav. Co.;[4] Fowles *v.* The Great Western Ry. Co.,[5] and really, in effect, under the original contract, as regards the ultimate carrier (the ship Melbourne to Australia), Scothorne *v.* South Staffordshire Ry. Co.,[6] that the carrier was *not* liable "as a common carrier *to the ultimate destination*," because the contract, expressly or impliedly, did not make him so. And, on the other hand, in the cases where he was so held liable, it was because, by his contract, express or implied, he had so made himself liable.

But, for another and much better reason, these latter English

[1] 2 C. & P. 598.
[2] 5 A. & E. 543.
[3] 6 A. & E. 634.
[4] 4 T. R. 581.
[5] 7 Ex. 699.
[6] 8 Ex. 341.

cases, "in which a station agent has been allowed to bind the corporation by a contract beyond its own lines," were of "no weight" in Burroughs *v.* Norwich & Worcester R. R. Co.,[1] because, although under the receipt given in this case there was the express contract to "forward and *deliver*" the goods to the shipper at their ultimate destination, which one might well think was a "special," or "positive," or *express* agreement to do so; yet it was held that this contract had been entered into without authority, and, therefore, in effect, that, under the actual contract in the case, there was an express agreement that, "in case loss or damage should be incurred, that company alone should be responsible therefor in whose actual custody the goods might be at the time of such loss or damage;" and, therefore, that the company, under such an express contract, was not liable for a loss to the goods after they had passed entirely out of their possession, "custody," and control.

The court there, very much in the spirit of the English cases on a much clearer point, came to the conclusion "that these facts were clearly insufficient to warrant a court or jury in inferring that he had authority to bind the defendants as common carriers beyond the line of their own railroad." We know of no principle which would "warrant a court and jury inferring," under such facts as these, that the defendants were not bound "as common carriers beyond the line of their own railroad," and yet that would exclude a court and jury from inferring the contrary under a different and very much clearer state of facts than that upon which rests the very doubtful decision, — as the case appears in the report of Burroughs *v.* Norwich & Worcester R. R. Co.[2] Certainly, it limits the power of a railway agent to bind the company by a freight receipt not only much farther than Armour *v.* Michigan Central R. R. Co.,[3] and that class of cases do, which hold, in the sense they do, that "the apparent authority is the real authority;" but even beyond the holding in very many of the cases which refute the errors (exposed in the previous Part of this Book) in Armour *v.* Michigan Central R. R. Co.,[4] and the cases following it. And, we notice further, that, on the point, the court in Burroughs *v.* Norwich & Worcester R. R. Co.,[5] do not cite a solitary case to sustain their position, although it is the real point involved in the case; and all their reasoning consists in the expression of an opinion of the *clear insufficiency* of the facts to warrant the inference.

[1] 100 Mass. 26.
[2] *Ibid.*
[3] 65 N. Y. 111.
[4] *Ibid.*
[5] 100 Mass. 26.

The case of Pendergast *v.* Adams Express Co.[1] is still less a refutation of the doctrine established by the English cases. In this case the parcel was given "Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties to complete the transportation,—such delivery to terminate all liability of this company for such package." The package in question having been so forwarded and delivered by the defendants, it was very properly held that they were not liable for the loss of a portion of the contents of the package, which took place after such delivery. This case simply answers the question put by Coleridge, J., in the spirit in which it was asked, in Gilbert *v.* Dale[2]: "Suppose goods were left with a carrier to be taken by him to York, and from thence *forwarded* to Edinburgh, would it be sufficient, in an action against him for negligence, to show that the goods did not reach Edinburgh?" From what appears in many of the cases in this country, as to the nature of the English decisions on the point, it would seem singular to say, but it is nevertheless true, that, in answer to such question, there is not an English case which replies to it *contra* to the holding in Pendergast *v.* Adams Express Co.[3]

True, in this case the court do say: "When a common carrier is a corporation established for the purpose of transporting goods over a certain route, goods delivered to such corporation, directed to a more distant place, are presumed by our law to be received for the purpose of being carried over its own route only, and then forwarded by another carrier to their destination." But this was not necessary for the purposes of the case, as in it, as we have shown, the liability of the carrier was expressly limited by the contract. And the only authority cited by the court for their proposition is Burroughs *v.* Norwich & Worcester R. R. Co.,[4] which, as we have seen, *supra*, sustains no such position. They further add: "When there is no charter to indicate the limits of the carrier's business, and no written agreement between him and the other party, the question what was in fact the extent of his undertaking is a question for the jury." To which we submit, that, by the English cases, as well as by all the well-decided cases on that point in this country, such, *under the proper directions of the court to the jury* in the particular case, is, too, generally the law, both in England and here, where there is an implied agreement between the carrier and the other party for the carriage of

[1] 101 Mass. 120.
[2] 5 A. & E. 543.
[3] 101 Mass. 120.
[4] 100 Mass. 26.

goods, though they are to be carried beyond "the limits of the carrier's business" as indicated by his charter.

It is now scarcely anywhere contended that a carrier's limits for the carriage of goods, under an express or implied contract, are strictly and necessarily confined to his charter limits.[1] With this correction, and the correction as to the actual holding of the Massachusetts court in Burroughs *v.* Norwich & Worcester R. R. Co.,[2] and the law as laid down and decided in Pendergast *v.* Adams Express Co.,[3] comes very closely to the law as it is established in England, and Ireland, and in many of the United States, agreeing with these.

Aigen *v.* Boston & Maine R. R.,[4] although another case usually cited for its assumed opposition to the holding of the English cases, is, we find, on examining it, really no nearer being so, than are the other Massachusetts cases which are generally cited for that purpose, and which we have examined. In this case the Maine Central R. R. Co. contracted for the transportation of horses over the whole line from Waterville, Maine, to Boston, Massachusetts, which included their own line as well as that of the defendants. The action against the defendants was in tort, with a count in contract, for injury to the horses. As far as the contract was concerned, the court held, in the strictest accord with the English cases, that the contract having been made between the plaintiff and the Maine Central R. R. Co., for transportation of the horses over the whole route, and not with the defendants, there was *no privity of contract between the plaintiff and defendants*, and that in whatever way *the contract* was looked at, the defendants thereby assumed no duty or obligation to the plaintiff which could be enforced by an action at all; that is, obviously meaning under the contract. This is the very essence of the doctrine of the English cases.[5] The court then say: "Whether the contract was introduced in evidence or not, the defendant corporation would be liable for any loss or injury occurring through its own negligence. [This is quite in accord with the English cases.] The English doctrine, that, where there is one contract for carriage over several connecting roads, the first carrier is exclusively liable for losses over the whole route, has never prevailed here; and the doctrine here is well established, that each carrier is responsible for the results of its own negligence, even although the first carrier may also by express

[1] See the very next case we state, Aigen *v.* Boston & Maine R. R., 132 Mass. 423, and decided by the Massachusetts Court itself, where such a power to contract is unquestioned.

[2] 100 Mass. 26.

[3] 101 Mass. 120.

[4] 132 Mass. 423.

[5] See *supra*, p. 87 *et seq.*, where we state them fully on this very point.

contract have assumed a responsibility for losses occurring on the lines of succeeding carriers."

This is absolutely inexcusable, and shows the most lamentable ignorance and perversion of what they call "the English doctrine" in the matter. The English decisions are, actually, the very reverse of what they are here stated to be, and the doctrine which is stated to be established in Massachusetts is precisely, as we have very fully shown[1] it to be, as decided, over and over again, in England.

Thus, in the late case of Foulkes *v.* The Metropolitan District Ry. Co;[2] affirmed in the Court of Appeal,[3] it was held that even assuming that the contract was with one company, so that an action for damages under the contract would lie against them, yet that an action would as well lie against another company with whom there was no contract, whose acts caused the injury to the plaintiff; the defendants, who had made no express contract, being liable independent thereof for their misfeasance. In that case it is laid down by Lopes, J.,[4] *as thoroughly decided by the authorities*, that where there is a contract with railway A. for carriage over railways A. and B., and damages have accrued from the negligence of railway B., *railway A. is liable to be sued on the contract, and railway B. for the negligence.*[5]

The incorrect statement of the English law in the matter, as stated by the Massachusetts Court in Aigen *v.* Boston & Maine R. R.,[6] is, in effect, the same as that other perversion of the English law on the same point, made by Redfield in his works on Carriers and Railways, and referred to by us, *supra*, p. 96 *et seq.*, and which is repeated over and over again in hosts of American cases. The statement of what the English law on the question is, was probably taken by the Massachusetts court from Redfield, without any examination of the English authorities in the matter. It is in this way that errors in law, being often repeated, are perpetuated. It will thus be seen that not one of the Massachusetts cases — which are always prominently cited to show that there is an "American rule" in the matter differing from, and entirely opposed to, what is called "the English rule" — at all affects what we think is the clear and undoubted soundness of the English cases on the important questions we are so fully considering.

The New York cases are generally cited as being in antagonism

[1] See *supra*, where we have cited the English cases literally in scores.
[2] 4 C. P. Div. 267.
[3] 5 C. P. Div. 157.
[4] 4 C. P. Div. at p. 282.
[5] See, to the same effect, the numerous English cases cited by us, *supra*, and, particularly the principles of law, as deduced from the English cases, at *supra*, p. 89, *et seq.*
[6] 132 Mass. at p. 425.

with each other; part of them being stated to hold in accordance with what has been laid down as "the English rule" in the matter, and part of them the reverse. We now proceed to examine them in detail, and to ascertain from such examination whether the doctrine they hold is or is not in accordance with that which we have shown by our examination of the English cases, to be the well-decided law in the matter in England.

The first of these cases, Ackley *v.* Kellogg [1] (A. D. 1828), was decided long prior to Muschamp *v.* The Lancaster Railway Co.[2] (A. D. 1841). In Ackley *v.* Kellogg, the defendants' express contract was to carry the goods to Troy, and there to *forward* them by a canal-boat, and for this latter service they received no compensation. The jury found that in so forwarding them, they followed the instructions of the plaintiff, and the court held that the defendants had thereby incurred no responsibility for a loss which took place after they had delivered them to the canal-boat. The court very properly distinguished the case from Hyde *v.* The Trent & Mersey Navigation Co.[3] (A. D. 1793), where the carriers were held liable for a loss while in the possession of their carters, in the course of their contract *transitus*.

The next case is Weed *v.* The Saratoga R. R. Co.[4] (A. D., 1838; still prior to Muschamp *v.* Lancaster Railway),[2] where it was held, quite in accordance with the English cases, and, as we have seen, by those in Massachusetts as well, that a railroad company contracting to carry passengers and their baggage beyond the limits of their own road, are liable for losses which occur on any part of the route, in respect of which the contract is made. The case also holds, quite in accordance with the English cases, that where a third party, not a party to the contract, claims against the carrier for loss or damage, he cannot recover in an action on a contract to which he is no party, but must recover in *tort*. It is repeatedly said that this case has been overruled by Van Santvoord *v.* St. John,[5] but we see no reason in the case itself to cause any question to be made of its correctness.

The case in 6 Hill, 157, came up first as St. John *v.* Van Santvoord,[6] and was decided A. D. 1841, and concurrently in this country, with the decision of Muschamp *v.* The Lancaster Railway Co.[7] in England. The similarity in the holding of the two courts, neither being cognizant of the holding of the other, is remarkable; although, as we shall see, there are essential differences between the two cases.

[1] 8 Cow. 223.
[2] 8 M. & W. 421.
[3] 5 T. R. 389.
[4] 19 Wend. 534.
[5] 6 Hill, 157.
[6] 25 Wend. 660.
[7] 8 M. & W. 421.

In St. John *v.* Van Santvoord,[1] the plaintiffs put a box of clothing on board one of the defendants' boats at New York, directed to "P., Little Falls," taking a receipt therefor, as "one box of merchandise, marked P., Little Falls." On arrival of the boat at Albany, the box was transferred to a boat forming part of a line of canal-boats plying between Albany and Little Falls, and the freight of the box *from New York to Albany* was paid to the defendants by the master of the canal-boat. On arrival of the box at Little Falls, it was found to have been broken open, and that some of the contents were gone. The defendants proved that their business was limited to the transportation of goods between New York and Albany, and that it was the universal custom or usage of all the tow-boat lines on the Hudson River engaged in that business, when they brought from New York boxes or packages directed to a place west or north of Albany, to deliver them over to the masters of canal-boats employed in the transportation of goods west and north of Albany, and to receive from them the river freight, which was charged to the consignee, and received on delivery of the goods to him; and having done so, the owners of the tow-boat lines considered their duty ended. Knowledge of such custom or usage, or that the defendants' line terminated at Albany, was not brought home to the plaintiffs, and proof of the custom was objected to by them; but the objection was overruled. The presiding judge charged the jury that there was no evidence of any contract on the part of the defendants to carry the goods to Little Falls, and that none could be implied from the receipt which had been given; that the known usage of the trade entered into and formed part of the contract between the parties; and if they should find that the goods were delivered at Albany, according to such usage, and that the defendants had used ordinary diligence in procuring a safe conveyance, and in forwarding the goods beyond Albany to Little Falls, they had discharged their duty as common carriers, and were entitled to verdict in their favor. The plaintiffs excepted to this charge. The jury having found for the defendants, the plaintiffs sued out a writ of error. The Supreme Court held unanimously that the court below erred in charging that the usage of the trade at Albany determined the rights of the parties, and also in charging that there was no express or implied contract to carry the goods beyond that place.[2] The

[1] 25 Wend. 660.

[2] Nelson, C. J., in delivering the judgment of the court, said: "It appears to me such a contract is fairly to be inferred from the receipt of the captain, in the absence of any explanation. The box was directed to P., Little Falls, indicating plainly to whom the plaintiffs were desirous of sending it, and was delivered on board for the express purpose of transshipment to him; and without any qualification or explanation the agent received the article, and gave his receipt therefor; in effect, saying to the plaintiffs, 'I will

case went to the Court of Errors,[1] where the judgment of the Supreme Court was reversed, five of the members of the court dissenting.

This case, instead of overruling Weed *v.* The Saratoga R. R. Co.,[2] expressly distinguishes that case,[3] on the ground that there the two lines were connected together between themselves; and the agent of the defendant took the pay in advance for the conveyance of the plaintiff and his baggage the whole distance. Or if no actual connection between the two lines was proved, it at least appeared that the defendant permitted its agent to hold it out as a carrier of passengers and their baggage for the whole distance, by taking pay therefor. But nothing of the kind appears in the present case. This equally distinguishes Muschamp *v.* The Lancaster R. R.,[4] although, at that time (A. D., 1843), the New York Court of Errors were not aware of the decision in that case. But there, precisely the same connection existed between the railways as in Weed *v.* The Saratoga R. R. Co.,[5] and, as in that case, there was but one through rate for the carriage of the goods; a point expressly relied on by Lord Abinger, C. B., in his judgment at pp. 427, 428.

In Van Santvoord *v.* St. John[6] there was not only the question of the established usage, but there was the further important fact that the defendants on delivering the goods at Albany were paid their freight in full to that point, and had no further connection whatever with the other carriers; differing here not only from Muschamp *v.* The Lancaster Ry. Co.,[7] but from all the other English cases where the doctrine in that case has been acted on, including even, according to their construction of the conditions in the railway receipt, the case in the House of Lords of Bristol, &c.

take and deliver it at the place of destination, according to the direction.' So the plaintiffs must undoubtedly have understood the contract. It is the plain interpretation of the transaction. If the defendants had intended to limit their duty as common carriers short of the place of destination, they should in some way have indicated to the plaintiffs this intent. Perhaps usage of the line brought home to them might have been sufficient, and might have controlled the otherwise reasonably implied engagement from the receipt; but the contract derivable therefrom is too explicit and manifest to be varied by the mere fact of such general custom. Regularly, the receipt itself should have limited the carriage to Albany, to be forwarded to the place of destination, if to be sent further. Then the defendants would have been liable, as carriers to Albany, and as forwarders only beyond that point. This is a very common arrangement with carriers. Garside *v.* The Trent & Mersey Nav. Co., 5 T. R. 389; Ackley *v.* Kellogg, 8 Cow. 223. The contract would thus have been materially modified, as the forwarder is only liable for ordinary care in procuring a proper conveyance for the goods; and all parties would have understood their rights and liabilities."

[1] Van Santvoord *v.* St. John, 6 Hill, 157.

[2] 19 Wend. 534.

[3] At p. 161, *per* Walworth, Chancellor.

[4] 8 M. & W. 421.

[5] 19 Wend. 534.

[6] 6 Hill, 157.

[7] 8 M. & W. 421.

Ry. *v.* Collins.[1] The case of Van Santvoord *v.* St. John[2] comes rather within that class of English cases represented by Upston *v.* Clark[3] and Gilbert *v.* Dale,[4] than within Muschamp *v.* The Lancaster Ry. Co.,[5] and the cases which follow it.[6]

The main question in the case was as to the evidence of usage, with reference to which the dissenting judges in the case claimed, that that question had not been sufficiently left to the jury.[7]

[1] 7 H. L. Cas. 194.
[2] 6 Hill, 157.
[3] 2 C. & P. 598.
[4] 5 A. & E. 543.
[5] 8 M. & W. 421.

[6] The distinction is well taken by Bockee, Senator, thus: "The implied contract which the law makes for the parties must be reasonable, and such as is consistent with the defendants' occupation and the usage of trade. If the receipt had been given by a person whose business was to receive goods for storage, the implied contract would be to keep them with ordinary diligence; and the name of a place marked on a box could not subject him to the liabilities of a common carrier." (At p. 162.) And again (at p. 164): "If a contract is to be implied merely from a mark upon the box and without reference to the nature of the employment or business of the party, then every carman who receives a marked bale of merchandise is in great danger. If the fatal name of 'Peckagama' or 'Chegorinegon' appear on the bale, the carman in the city as well as the freighter on the Hudson will be held liable as common carrier till the goods shall reach their remote destination. Such cannot be the law. The practical inconvenience and injustice of such a rule would be too great to be endured." The same distinction is observable in the judgment of Rhoades, Senator, who says (at p. 170): "There are men in this State who are engaged as common carriers in the transportation of the produce of the country by land. One of these men receives a load of flour on board his wagon *for the purpose of delivering it at some point on the Erie Canal* [the question is simply as to the entirety of the contract, express or implied], the barrels being marked and directed to a town in the interior of the State of Maine. The carrier neglects to make a special contract (*a*) that his liability is to cease at the point of delivery on the canal; but he delivers the flour in good order on the canal, and the property is forwarded from one line of transportation to another, until it passes into the hands of the last carrier on the route, by whose want of care it is lost. It would, under such circumstances, be a most severe and harsh rule of law which should make the person who first undertook the transportation of the article liable for its loss."

[7] The views of the majority of the court on the subject are well expressed by Putnam, Senator (pp. 165–167), thus, — "The case mainly rests upon *the legal presumptions arising from the delivery of the box* to the plaintiffs in error, taken in connection with the facts proved in relation to the nature of their business and the usage applicable to it. . . . Irrespective of any special agreement, or of any express proof of knowledge by the shipper of the custom of the carrier, or the limit of his line, my impression is, that when goods going west of Albany are committed to a carrier whose route terminates at that place, he discharges his duty under his implied obligation when he makes a delivery according to the uniform course of business pursued in similar cases. Such should be the law. The usage or custom enters into and forms a part of the contract created by the deposit of the goods with the carrier. In the case of Hyde *v.* The Trent & Mersey Nav. Co., 5 T. R. 389, the question was whether delivery of the goods at a warehouse in Manchester was a delivery to the plaintiff; and Mr. Justice Grose said: 'Whether it be or be not a delivery, may depend on the general custom of the trade, or the particular usage which has prevailed between the parties themselves.' In Garside *v.* The Trent & Mersey Nav. Co., 4 T. R. 581, evidence of the usage and course of business was received to determine whether the defendants, at the time the goods were burned, held them as common carriers or mere wharfingers for

(*a*) *Special* is here evidently used in the sense of *express*, which has probably given rise to its being subsequently so often erroneously used in the statement that "a carrier can only be made liable by *special* contract." In many of the cases, and by the text-writers, it is used in some misty sense other than express, as "by a special contract, express or implied.'

Eliminating from the case the question whether the usage had or had not been sufficiently proved and submitted to the jury, there is nothing in it in the different facts of the case to interfere with the holding in Muschamp *v.* The Lancaster Ry.,[1] or to overrule Weed *v.* The Saratoga, &c. R. R. Co.,[2] a case which, as we have seen, is virtually identical with Muschamp *v.* Lancaster Ry.

The minority judges in Van Santvoord *v.* St. John,[3] while claiming, just as, in effect, is held in the two above last-named cases, that the receipt and the marks upon the box formed an important item of evidence in showing what the parties understood to be the agreement at the time the box was delivered, admitted that satisfactory evidence of usage would overcome the inference to be derived from such facts.[4] It will be noticed that it was admitted

the plaintiffs. Mr. Justice Cowen, in the case of Gibson *v.* Culver, 17 Wend. 305, said: 'Nor do I understand the force of usage in such a case to be denied, but on the contrary it is expressly admitted in Ostrander *v.* Brown, 15 Johns. 39.' Evidence of usage and practice was received in the case of Sewall *v.* Allen, 6 Wend. 335, to prove that the defendants were common carriers of bank bills. It was resorted to also in Barnes *v.* Faley, 5 Burr. 2714, and Mr. Justice Aston there observed, that 'the limits of the delivery are to be determined by the usage of the place.' And in Rushford *v.* Hadfield, 7 East, 224, the court agreed in the propriety of such evidence to enlarge the rights of carriers. I have not been able to discover, therefore, that any error was committed by the Common Pleas in receiving the evidence of usage given in this case. From the evidence given at the trial, the jury had a right to assume that the box in question was delivered to be transported according to the business of the line; and, if necessary, that the usage was well known to the plaintiffs. In other words, it was the province of the jury to determine the effect and extent of the implied contract between the parties."

[1] 8 M. & W. 421.

[2] 19 Wend. 534.

[3] 6 Hill, p. 171, *et seq.*

[4] Thus, in expressing their views on the point, Porter, Senator, said, — "If the defendants in error, when they took the receipt, knew that, by general and common usage, the responsibility of the plaintiffs in error, for articles sent by them, extended only to the safe delivery of the articles on board a responsible canal-boat at Albany, this would undoubtedly have qualified the receipt; and if the testimony established that point in the opinion of the jury, they should have found for the plaintiffs in error. I admit also that proof of something short of actual knowledge on the part of the defendants in error, would have warranted such a verdict. The principle laid down in Gibson *v.* Culver, 17 Wend. 305, furnishes, I think, the true rule which should govern this and similar cases. That was the case of a stage-coachman, who had a parcel delivered to him to carry to Troy, directed to a mercantile house in that city. It was left at the coach office, and no notice was given to the persons to whom it was directed. The parcel being lost, the consignor sued the stage proprietors, and claimed that they were liable because they had not given notice to the consignees. The court decided that it was competent for the defendants to prove, that the uniform usage and course of business was to leave goods at the usual stopping places of the coach, without giving notice to the consignees; and that if such usage had been so long and so well understood as to warrant the jury in saying that the consignor knew it, the carrier would be discharged. This rule is founded in good sense. If the consignor understood the usage and course of business, he would have said to himself: 'All the carrier has to do is to leave the parcel at the coach office, and he has then performed his contract; I must therefore give notice to the consignees.' But if the consignor did not understand the usage, the law would warrant him in presuming that the parcel would be delivered by the carrier to the consignee. This must be so, or the usage would operate as a fraud upon the consignor; for the common-law obligation, which, in the absence of any different one expressly entered into, or implied from known usage, requires the carrier to make delivery to the consignee, would thus be modified and varied without the knowledge of the other party. This certainly can never be tolerated. The

all around that sufficient proof of usage would overcome the implication resulting from the goods being received marked for a destination beyond the carrier's immediate route.[1]

In Jacobs *v.* Hooker,[2] the contract was express that the defendant was to carry the goods from New York to Troy, and then forward them to Worcester, Ohio. It was held, where it was found, at a point between Troy and Worcester, that a part of the goods had been abstracted, the burden was on the defendant to show that he had carried the goods to Troy and then duly forwarded them. There is no question as to the correctness of this case.

Wilcox *v.* Parmelee[3] follows and approves of Muschamp *v.* Lancaster Ry.,[4] and holds that, one fixed rate being charged for the whole distance, the defendant, who contracted "to forward" (here construed "to carry") goods to a locality beyond his own immediate route, was liable for a loss that took place in connecting vessels, he having improperly forwarded the goods in sailing vessels instead of steam vessels. The materiality of the case is in the stress that is laid in it on the through payment.[5]

jury must in these and the like cases find, that the usage has such continuance, publicity, and general acceptation, as would charge the consignor with notice of it. In the case before us, the defendants in error had a right to infer from the conduct of the captain and from the receipt, that the box would be carried to Little Falls; and the proof given of a usage at Albany, among carriers, was insufficient to authorize the court in determining that such was not the contract. If the plaintiffs in error wished to vary or modify their common-law liability, they should prove a usage so publicly and generally known at New York, where the plaintiffs resided, as to warrant the jury in saying that it was probably known to the defendants in error, and that they contracted in this case in reference to it. Proof of such a usage would have limited the import of the receipt. The defendants in error had a right to require this proof, and then that it should be submitted to the jury."

[1] Although this case was not decided in the Court of Errors until A. D. 1843, or two years after the decision of Muschamp *v.* Lancaster Ry., 8 M. & W. 421, yet the New York court seemed to have known nothing of this decision. But on precisely the same ground on which they distinguished Weed *v.* The Saratoga, &c. R. R. Co., 19 Wend. 534, is Muschamp *v.* Lancaster Ry., 8 M. & W. 421, distinguishable.

[2] 1 Edm. 472.

[3] 3 Sandf. 610.

[4] 8 M. & W. 421.

[5] After quoting from Lord Abinger, in Muschamp *v.* Lancaster Ry., 8 M. & W. 421, as to the inference to be drawn from the carriage money being one undivided sum, and approving of the conclusion there arrived at, the court say: "Here the defendant undertook, for a specified price, to forward the goods in question from New York to Fairport. The criticism of the defendant on the word 'forward,' as used in the contract, is not just. It applies to the whole distance, as well to that portion of the route where he employed his own means of transportation, as to those portions where other parties were owners of the vessels. He was to forward the goods from New York to Fairport, not from Buffalo, where he now says was the termination of his own immediate route. The word, as used by him, can only mean, that he was to carry or transport the goods, and whether in his own vessels, or in those of others, was perhaps immaterial to the plaintiff, provided on those parts of the journey where steam was to be used, they were carried in steam vessels. Besides, there is a fixed sum which covers the whole charge, and it would be absurd to suppose that the defendant was to receive the whole sum for merely forwarding, that is placing the goods on the vessels of some other party, to be carried to their place of destination." The court further say:

The case of Hart *v.* The Rensselaer, &c. R. R. Co.[1] is quite consistent with the English cases. The agent of a road, which was one of three connecting roads, sold a ticket for the entire route. It was held that this was an entire contract for the whole route, and that the road whose agent sold the ticket was liable for the loss of luggage which took place on any portion of the route. The sale of the ticket over the whole route raises an implication very similar to that of receiving goods marked for an ultimate destination and receiving pay for their carriage over the whole route.[2]

It is simply a question of contract, express or implied. In Hunt *v.* The New York & Erie R. R. Co.,[3] it was held that if either of the carriers is liable for the whole route, it could only be the one who made the original contract for transportation. Those who subsequently receive and forward the goods can only be liable for damage done by themselves, and not for damage before the goods came to their custody, even where they have received the freight for the whole distance; receiving the freight

"The case in our books most analogous to the present is perhaps that of Fairchild *v.* Slocum, 19 Wend. 329. There the defendants held themselves out as carriers, and the court say it is of no moment whether they use their own vessels, or employ the vessels of others to carry for them on some part, or even all of the route; that it is enough that they received the goods on an undertaking to deliver them at their place of destination. And see Weed *v.* S. & S. R. R. Co., 19 Wend. 535." And they thus distinguish St. John *v.* Van Santvoord, 6 Hill, 157: "There was no special undertaking in that case; no price; no contract. The goods were put on board the defendant's barge in New York, directed to a place on the Erie Canal, and were lost on the canal. The defendants in that case were carriers on the Hudson River only, and proved that they forwarded the goods from Albany in the usual and customary manner." This is very far from treating that case as though it held any doctrine *contra* to Muschamp *v.* Lancaster Ry., 8 M. & W. 421, or as though it had overruled Weed *v.* Saratoga, &c. R. R. Co., 19 Wend. 535.

[1] 4 Seld. (8 N. Y.) 37.

[2] An agreement "to forward," in Kreuder *v.* Woolcott, 1 Hilt. 223, was construed to mean an agreement *to carry* the entire distance, where freight was to be paid for that distance. The court follow Wilcox *v.* Parmelee, 3 Sandf. 610; Weed *v.* The Saratoga, &c. R. R. Co., 19 Wend. 534, and Hart *v.* The Rensselaer, &c. R. R. Co., 4 Seld. 37, without any intimation that either of these cases had been overruled, and say: "The agreement in the bill of lading *to forward* the goods from New York to St. Louis, and the specification in the bill of the amount of freight for the whole distance, show that the defendants undertook, as common carriers, to deliver the goods in St. Louis. The defendants were not forwarders, but carriers. Green *v.* Clarke, 2 Kern. (12 N. Y.) 343. A simple engagement to forward goods at New York, marked for a particular destination, is discharged by shipping the goods by the usual or most direct conveyance to the place designated; but an agreement to forward them from New York to the place of destination, the charge for freight for the whole distance being specified in the agreement, is very different. It is an agreement to carry them for that distance, or to be responsible for their safe carriage and delivery at the place designated in the agreement." Mallory *v.* Burrett, 1 E. D. Smith, 234, is to the same effect. The head-note there is: "The carrier with whom a contract for transportation is made, is responsible for the safe carriage of the goods to the place of destination, as fixed in the contract, both on his own route and on the subsequent routes to which the goods may be transferred; and he is not entitled to any additional compensation, although, in consequence of the charges upon the subsequent routes, the whole transportation may cost more than the contract price."

[3] 1 Hilt. 228.

for the previous lines only as their agents, and making a charge for their own freight separate and distinct from the other charges. This sustains the distinction in the English cases as to an action against the contracting carriers on their contract, and against the others in *tort* for damages independent of contract.

The case of Dillon *v.* The New York and Erie R. R.[1] is perfectly consistent with the English cases. There, the goods were marked for their ultimate destination, St. Paul, Minnesota; the receipt given by the defendants so stating, and that they were to the care of C., Galena, Illinois; itself short of the designated ultimate terminus. The defendants' road only extended to Dunkirk, which was known to the shipper, who was told by the general freight agent of the road that it was not necessary for him to have an agent at the terminus of the road to receive the goods there, but that they would be *forwarded* on to him. The Marine Court held that the receiving company were liable for the loss of the goods which occurred after they had been duly forwarded by the defendants from Dunkirk. This decision was very properly reversed by the court of Common Pleas.[2]

[1] 1 Hilt. 231.

[2] Daly, J., in delivering the judgment of the court, said: "There was nothing in the evidence to warrant the court below in finding that the defendants undertook to carry the brandy to the place of destination. They merely engaged to carry it to Dunkirk, the terminus of their road, and to ship it, or forward it from there by the usual line of conveyance to Galena, the place of destination, and this they did. Their liability, as common carriers, ceased at Dunkirk, and they then assumed the character of forwarders. In Weed *v.* Saratoga, &c. R. R. Co., 19 Wend. 534, the two lines were connected together by an arrangement between themselves, and the defendants took the pay in advance of the conveyance of the plaintiff and his baggage for the whole distance. Such was also the case in Hart *v.* The Rensselaer, &c. R. R. Co., 4 Seld. 37; and in Wilcox *v.* Parmelee, 3 Sandf. 610. The defendant agreed in writing to forward the goods of the plaintiff from New York to Fairport, to the close of the season, at a certain rate *per* 100 lbs., and the court, though the word *forward* was used, held that this was an agreement, in substance, to carry the whole distance for a specified price. In these cases the carrier received, or it was agreed that he should receive, the amount paid for transport to the place of destination; and thus having received, or contracted to receive, the full reward, he was bound to perform the entire service. [This equally distinguishes Muschamp *v.* The Lancaster Ry., 8 M. & W. 421.] But nothing of the kind appeared in this case. The inquiry made by the shipper showed that he knew that the defendants' road terminated at Dunkirk. He merely asked if it would be necessary to have an agent at that place or at Chicago, to receive the goods, and was told that it would not; that the goods would be shipped right on through; that they would be 'forwarded on to him;' that the direction on the goods was all that was necessary; and what the defendants engaged to do upon the arrival of the goods at Dunkirk, they did, by delivering them to a transportation line engaged in transporting merchandise from Dunkirk to the place where the goods were directed. The reply to Knox by the freight agent, that it would be unnecessary to have an agent to receive the goods at Chicago, that they would be shipped right on through, was, as respects anything beyond the terminus of his own road, but the expression of an opinion or belief that the goods would be duly forwarded, upon arriving at Chicago, to the place to which they were destined, and cannot be construed as an engagement or undertaking on his part, on behalf of the defendants, to carry them, or to be responsible for their carriage to the ultimate place of destination." There is another point in this case not noticed by the court. While Chicago is on the extreme east of Illinois, Galena is on its extreme west. As the goods were shipped by

In Wing *v.* The New York & Erie R. R. Co.,[1] where the receiving company had taken pay for the transportation of goods over an entire route, they were held liable on their contract; yet the connecting company, though not parties to the contract, were also, as the English cases we have stated hold, liable for a loss caused by their own negligence.

Wright *v.* Boughton,[2] although, like Van Santvoord *v.* St. John,[3] often cited to show the establishment of a different doctrine than that of the English cases, is no more than is that case, intelligently considered, an authority for anything of the kind. In Wright *v.* Boughton,[4] the defendants were partners in transporting goods and passengers between Lewiston and Niagara Falls by wagons. Whatever contract there was in this case was in writing. The receipts acknowledged the receipt of the goods on board the defendants' line "to be delivered in like good condition," but naming no place for delivery. At the bottom of the receipts were copied the addresses on the goods, places in Michigan, and beneath these were "M. C. R. R.," meaning the Michigan Central Railroad. In one of the shipping notes of the goods was "Freight to Falls, $0.38. M. C. R. R.;" and in the other "M. C. R. R. Freight to Niagara Falls, $0.38." And in both of the shipping notes it was stated how the goods were "marked," which corresponded with the marks on the goods and in the receipts. There was no connection or interest in business between the defendants and any other company or line; their business being to carry goods by wagons between Lewiston and Niagara Falls, — a distance of some seven miles; and such was the general understanding. The goods were duly delivered to the Michigan Central R. R., and were lost and sunk in their steamer on Lake Michigan. In an action against the defendants for the value of the goods, on an alleged contract that they had undertaken to deliver them to the places in Michigan to which they were addressed, the court was requested to instruct the jury that if they found that the defendants carried the goods from Lewiston to Niagara Falls, so that they might be forwarded from there, as directed in the shipping bills, then they must find for the defendants. The court refused to do this, and directed the jury to find a verdict for the plaintiffs. It is an utter distortion of Muschamp *v.* Lancaster Ry.[5] to fancy that that case is a warrant for such a

the shipper to the care of C., Galena, obviously proof that the goods never reached St. Paul, Minnesota, would not be sufficient to cause the defendants to be liable for the loss of the goods, even assuming that the defendants were carriers to Galena; the point treated by the court as the ultimate point to which the defendants were forwarders.

[1] 1 Hilt. 235.
[2] 22 Barb. 561.
[3] 6 Hill, 157.
[4] 22 Barb. 561.
[5] 8 M. & W. 421.

course as was pursued on the trial of Wright *v.* Boughton.[1] In the former case the direction of Rolfe, B., was, that the taking a parcel by a carrier, directed for carriage to a particular place, was *primâ facie* evidence (that is, simply, some evidence) of an undertaking by the carrier to take it to the designated place; or, as Lord Abinger put it (at p. 426), "this being evidence whence *the jury might infer* that they undertook to carry it in safety to that place." And further (at p. 427), "Now, it certainly might be true that the contract between these parties was such as that suggested by the counsel for the defendants, but other views of the case may be suggested quite as probable; such, for instance, as that these railroad companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last. The fact that, according to the agreement proved the carriage was to be paid at the end of the journey, rather confirms the notion, that the persons who were to carry the goods from Preston to their final destination, were under the control of the defendants, who consequently exercised some influence and agency beyond the immediate terminus of their own railway. *Is it not then a question for the jury to say what the nature of the contract was; and is it not as reasonable an inference for them to draw, that the whole was one contract, as the contrary?*"

In Wright *v.* Boughton,[2] on the contrary, considering the small specific sum to be paid the defendants for the conveyance in their independent line of wagons, to the terminus of their own route, entirely unconnected with any other line, and with the name of the railway to which they were to be forwarded, and by which they were to be conveyed to Michigan, expressly mentioned in the shipping notes, and the address being copied into the receipts and shipping notes, merely as matter of description; there was nothing whatever, whether for the court or jury, to warrant the inference that the facts in this case constituted a contract between the plaintiff and defendants for the conveyance of the goods by the defendants any further than to the place to which they were to be paid freight as mentioned in their shipping notes. And, on the facts in the case, had *they* brought an action for freight for the transportation of the goods to Michigan, on any contract expressed or to be implied from the named facts in the case, such action could not for one moment have been sustained. The court above well held that there was no such agreement

[1] 22 Barb. 561. [2] *Ibid.*

expressed, as that the defendants should themselves convey the goods to Michigan; and that there was nothing in the case from which such an agreement could be inferred (except the fact that the receipts and shipping notes contained the address or directions, copied from the cards put upon the goods) that the instruments should be so construed; that the address was incorporated in the instrument for the purpose of identification, and that the parties had no idea that the defendants were entering into a contract to transport the goods beyond the route occupied by them as common carriers.

The case comes within such cases as Upston *v.* Clark;[1] Gilbert *v.* Dale,[2] and Symes *v.* Chaplin,[3] stated by us, (*supra*, p. 76 *et seq.*). There is no more ground for holding, from the facts in Wright *v.* Boughton,[4] that the defendants expressly or impliedly contracted to carry the goods to Michigan and deliver them there, than there is in Scothorn *v.* The South Staffordshire Ry. Co,.[5] stated *supra*, p. 79, for holding, under the original contract in that case (which case, by the way, expressly follows Muschamp *v.* The Lancaster Ry. Co.,[6] and Watson *v.* The Ambergate Ry. Co.),[7] that because the plaintiff's box was marked for its ultimate destination, "Australia," the defendants, merely from that fact, would have been liable for its delivery there, notwithstanding the facts, as a whole, showed that they only contracted to deliver the box at London, to the ship Melbourne, there; to which point alone were they paid, and not for the conveyance to the point of its proposed ultimate destination, Australia, *per* the ship Melbourne.

Many of the American cases give a wider signification to the language of Rolfe, B., in Muschamp *v.* The Lancaster Ry. Co.,[8] than it fairly bears, which has led to much of the misapprehension which we find in some of the cases in this country as to the law in the matter as established in England, as we have shown it to be in our examination of the cases, at p. 74 *et seq.*

In the later case of Foy *v.* The Troy & Boston R. R. Co.,[9] the head-note is: "Where a railroad company receives, for transportation, property addressed to a person at a point beyond the terminus of its road, it will be understood, in the absence of any proof to the contrary, to have agreed to deliver the property, in the same order and condition in which it was received, to the consignee."[10]

[1] 2 C. & P. 598.
[2] 5 A. & E. 543.
[3] 5 A. & E. 634.
[4] 22 Barb. 561.
[5] 8 Ex. 341.
[6] 8 M. & W. 421.
[7] 15 Jur. 448.
[8] 8 M. & W. 421.
[9] 24 Barb. 382.

[10] Harris, J., in delivering the unanimous judgment of the Supreme Court of New York, says: "The only point upon which the counsel for the defendants relied upon the argument, was that the defendants were only carriers from Troy to Eagle Bridge, the terminus of their road. But a sufficient answer to this position is, that the wagon was to be carried to Burlington.

Burtis *v.* The Buffalo, &c. R. R. Co.[1] was a case where there was an express contract to carry and deliver goods on the line of a connecting road, and it was held that such a contract could be made as well at common law as under the New York statute, and that under the statute[2] the contracting company's liability extended over the whole route with reference to which it had contracted, even though this extended outside of the State of New York.

In Root *v.* The Great Western R. R. Co.,[3] the A. company received goods from the plaintiff at New York, upon the express contract that that company should transport the goods to their warehouse at Suspension Bridge, and should not be liable for any loss of or injury to such goods after they had been sent from their warehouse. The goods, which were marked for Burr Oak, Michigan, a place on the route of the B. company, were delivered to the defendants at Suspension Bridge, without any express contract or limitation of liability, and in the ordinary course of their duty as common carriers. The defendants carried the goods safely to Detroit, the customary place for the delivery of freight for places on the B. railway, and there delivered them to the latter company, where, on the same night, they were destroyed by an accidental fire in the warehouse of the B. company. The custom between the defendants and the B. company was that the B. company collected the freight on goods going west of Detroit, and paid to the defendants their freight-money for the transportation to Detroit, and there was no community of interest or partnership between the defendants and the B. company. To hold the defendants liable on an implied contract to carry the goods to Burr Oak, Michigan, under such circumstances as these, would be to hold not only the first or receiving company so liable, from the mere receipt of goods marked to an ultimate destination, where there was no express contract nor any other circumstances in the matter to affect the case, supposing that were possible; but it would be to imply, where the first, or any subsequent railway company, had expressly exempted themselves from the responsibility for the carriage over connecting roads, a new contract be-

It was consigned to a person residing there. Having been received by the defendants, thus addressed and consigned, they must be understood, in the absence of any proof to the contrary, to have agreed to deliver it, in the same order and condition in which it was received, to the consignee. It was no part of the plaintiff's business to inquire how many different corporations made up the entire line of road between Troy and Burlington; or, having ascertained this, to determine at his peril which of such corporations had been guilty of the negligence which resulted in the injury to his wagon. He made his contract with the defendants. They agreed to deliver his wagon safely at Burlington. Whether they were to carry it upon their own, or the road of some other corporation, was a question which did not concern the plaintiff. If the defendants had thought fit to limit their liability to injuries occurring on their own road, they should have provided for such limitation in their contract."

[1] 24 N. Y. 269.

[2] New York Acts, ch. 270 of 1847.

[3] 45 N. Y. 524.

tween each and every one of the connecting roads and the original shipper, with whom they had never been in contract at all, to carry the goods over their own and all the subsequent connecting roads in the whole line of railway. That is, the very thing that in Muschamp *v.* The Lancaster Ry. Co.[1] (where it was held that the circumstances of that case would justify a jury in inferring that the receiving railway had impliedly contracted with the shipper, from whom they had received the goods, for their conveyance over the entire route) they wished to avoid, namely, the necessity of implying that the shipper must be supposed to have made a new contract with every one of the connecting roads, would have to be implied; and not only that, but right in the very teeth of the English decisions and of common-sense, while such a contract would have to be assumed as to make the first company liable *exclusively*, on their implied contract, for the loss of the goods over the whole route, the contradiction would also have to be assumed that such a liability was not *exclusive*, but that each of the subsequent connecting companies, no matter how many of them there might be, had also an *exclusive* liability for the loss of the goods on their road and on all the subsequent connecting roads. And this absurdity and self-destructive contradiction would have to repeat itself as often as there was a connecting road on the entire route of railways.

Try the question out with an express contract, and the absurdity of this is exposed. If an express contract is made by a shipper with the A. company, for the conveyance of goods over the lines of the A., B., C., and D. companies, there is but one contract, which is between the shipper and the A. company, and the B., C., and D. companies are not liable, in contract, for the breaches of A.'s contract, no matter on what portion of the lines such breach may have been committed. Precisely in the same way is it in the case of an implied contract (and this is one, and a very important one, of the *media* by which it can be ascertained as to what the contract is which is to be implied); if the contract to be implied is with the first company, then it is with that company exclusively, and the subsequent companies are no more parties to that contract, because it is raised or implied from the surrounding facts and circumstances, than they would have been if a similar contract to that which is to be implied had been expressed. This, we think, is sufficient to show the absurdity of the position in Root *v.* The Great Western R. R. Co.[2] taken by the New York Court of Appeals, that to hold in that case that the defendants were not liable would be to hold counter to the whole line of

[1] 8 M. & W. 421 [2] 45 N. Y. 524.

English decisions. We think no stronger or plainer instance of the palpable misunderstanding which, we think, largely prevails in this country as to the effect of the English cases on the question, can be found.[1]

The glaring error made in these cases as to the effect of the holding in England is in assuming, as they in effect do, that where in Muschamp *v.* Lancaster Ry. Co.[2] it was held that the fact of the goods being specifically marked for a destination was some evidence from which a jury might infer a contract by the receivers of such goods to carry them to the designated place, for which they ostensibly received them; that such evidence — which, clearly, is evidence to that effect, so far as it goes — is treated in the English cases as though it were conclusive. That such is an entire misconception we have clearly

[1] It was found, in the case in question, by the referee in the court below, that the defendants were liable; the only evidence in support of such finding being the admission of the parties on the trial that the goods were shipped at New York, with the A. Company, from whom the defendants received them at Suspension Bridge, and that the goods were marked "Burr Oak, Michigan." The court, in deciding that the defendants were not liable, as we think it is perfectly clear that they were not, say: "It is found that the goods were received by the defendants without any express contract or limitation of liability, and in the ordinary course of their business and duty as common carriers, and there is no evidence of any express contract as to their transportation by the defendants. Unless, therefore, the receipt of goods thus marked, in the ordinary course of business of a carrier, raises by operation of law an implied contract to carry them beyond the line of the carrier receiving them, and to deliver them at the final destination designated by the marks, there is no foundation for the finding of any such contract. The English authorities hold that in such a case, the company first receiving the goods marked for a particular place, without expressly limiting its responsibility, undertakes *primâ facie* to carry them to their destination, even though beyond the limits of the company's route, and is to be regarded as a carrier throughout the entire route; and that this rule applies when the goods are directed to points even beyond the limits of England; and the English cases have carried the rule so far as to hold the contract is exclusively with the first company [How then can their reasoning be so distorted as to make it signify that it is with each successive company, and with each successive company *exclusively*, too, as is implied by the statements and reasoning of the court in Root *v.* The Great Western R. R. Co., 45 N. Y. 524?], and that there is no right of action in favor of the owner against any of the subsequent companies on the route. [But, by their distortion of the holding in the English cases, they would really assume that the English cases hold the nonsensical contradiction that while "there is no right of action in favor of the owner" — that is, in contract — "against any of the subsequent companies on the route," there is an action in contract against each of them, and that "*exclusively*," too, against each and every one of them.] But a different rule has been adopted in this and other States of the Union, and it is here held that the receipt of goods marked for a place beyond the terminus of the carrier's route does not import a contract to carry them to their final destination; but that, in the absence of a special contract ["special contract" again!] and of a partnership between the connecting lines [This, apparently, is matter outside of what is called the "special contract"], the carrier is only responsible to the extent of his own route, and for the safe delivery to the next connecting carrier; that in such a case the carrier is merely a forwarder from the terminus of his own line; and that where goods thus marked are delivered to a carrier, unaccompanied by any particular directions except such as might be inferred from the marks themselves, the carrier is only bound at the terminus of his own line, to deliver them according to the established usage of the business in which he is engaged." This is, in effect, the same language as that in Judge Redfield's works on Carriers and Railways, which we have quoted, and the incorrectness of which we have pointed out.

[2] 8 M. & W. 421.

shown, and the decisions in Upston *v.* Clark,[1] Gilbert *v.* Dale,[2] Syms *v.* Chaplin,[3] and even Scothorn *v.* South Staffordshire Ry. Co.[4] (not to mention Garside *v.* The Trent Nav. Co.,[5] and other cases of that class, to which we have referred) plainly show the incorrectness of the deduction as to the effect of the holding of the English cases, so glaringly manifest in several of the text-books, and in many of the cases in this country.

For the statement of the result of the American decisions, Van Santvoord *v.* St. John[6] is cited in Root *v.* The Great Western R. R. Co.[7] But we have already shown that that case is clearly distinguishable from Muschamp *v.* The Lancaster Ry. Co.,[8] and that it expressly distinguished and in effect sustained Weed *v.* The Saratoga, &c. R. R. Co.,[9] which was decided concurrently with, and in ignorance of the holding in, Muschamp *v.* The Lancaster Ry. Co.,[10] which case it is in principle identical.[11]

[1] 2 C. & P. 598.
[2] 5 A. & E. 543.
[3] 5 A. & E. 634.
[4] 8 Ex. 341.
[5] 4 T. R. 581.
[6] 6 Hill, 158.
[7] 45 N. Y. 524.
[8] 8 M. & W. 421.
[9] 19 Wend. 534.
[10] 8 M. & W. 421.
[11] The court, in Root *v.* The Great Western R. R. Co., 45 N. Y. at p. 532, further say: "Such an understanding may be established by express contract, or by showing that the company held themselves out as carriers for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through; but at the time of the passage of the Act of 1847, it had been settled by the case of Van Santvoord *v.* St. John, that the marks on the goods were not of themselves *evidence of such an undertaking.*" This, again, admirably shows how greatly the effect of the English cases has been distorted. "Not *of themselves* evidence of such an undertaking." This language means either that the English cases hold that such evidence is either *conclusive* evidence or that it is not conclusive evidence, but that it is some evidence of such fact. Here, then, is a dilemma. If the language means anything at all, it means that, *contra* to the alleged English holding, such marking is not *conclusive* evidence ("of themselves") of such an undertaking. There is not a solitary English case holds it is. In fact, as we have clearly and exhaustively shown, the English cases merely hold that it is some evidence for the consideration of a jury, from which it may be competent for them to infer such an undertaking. Why, even Bristol & Exeter R. R. *v.* Collins, 7 H. L. Cas. 194 (which is a case, in the facts, almost identical with Root *v.* The Great Western R. R. Co., 45 N. Y. 524, and, as regards the effect of the marks, decided, too, in identically the same way), shows that the receipt of goods so marked is not held in England as conclusive as to the liability of the company receiving the goods so marked; because the defendants in that case did receive the goods so marked, and it was held that they were not liable, on an implied contract, for their carriage, which they would have been if such evidence were conclusive. But take the other horn of the dilemma, and assume that the New York Court meant that the English cases mean that such marks are not some "evidence of such an undertaking," and that such holding is incorrect. The manifest absurdity of this view is equally apparent. An express contract to take the goods to such a specified destination would bind the contractors so receiving the goods to take them to the named destination. Why, then, should not the fact that the common carriers, who receive goods for carriage, have so received them specifically marked for a designated place to which they are consigned, and to which they are to be transported, — this fact being not only implied but expressed by their address, — be some evidence that by such receipt of goods so marked the carriers impliedly contract to carry them to their marked destination? If the designated place were on their own immediate route, such evidence, in the large majority of the cases, would not only be some evidence of that fact, but would be virtually conclusive of it. Why, then, when, as far as the shipper is concerned,

Returning more immediately to Root *v.* The Great Western R. R. Co.,[1] we would remark that, as it would be competent for an intermediate company, by express contract, to assume the responsibility for the carriage of goods over successive lines; so, equally, might they, by the implication resulting from facts and circumstances, impliedly so contract to carry goods. Thus, if, notwithstanding the goods had been shipped by another railroad company to the starting point of the intermediate company, the original shipper or his agent were present and re-shipped the goods, presumably similar facts and circumstances to those from which a contract might have been implied with the first company receiving the goods, might also raise an implied contract with the second or connecting company; and so with any other later company on the line of route. Or such might be the case where the contract of the first company — as in Root *v.* The Great Western R. R. Co.[2] — for the carriage had been entirely ended; and the first company delivered the shipper's goods as the agents of the shipper. In such a case the mere receipt of the goods marked for a designated point might be evidence — as far as it goes — of an implied undertaking by the receiving company to carry them to such designated point; and if the second company, in addition to receiving the goods so marked for a definite point, exacted from the first company, as the agents of the shippers, the full payment for the freight to that point, that would be additional evidence

the designated point may or may not be, for aught he knows, on their own immediate route, or on a road over which they have running powers, or which is in partnership with, or otherwise controlled by, themselves, may not such fact be some evidence, among other circumstances, from which a jury may infer a contract, by the company so receiving the goods, to carry them to the place for which they are specifically marked? So, on the one hand, if they say they mean that the English cases hold that such evidence is conclusive, the English cases themselves show that such an assumption is incorrect. If, on the other hand, they mean that the English cases hold — as they do hold — that such evidence is some evidence for a jury, with other facts, then no American writer or case has ever yet shown, or can show, why that alone, of all the facts, is not some evidence of that which it unquestionably so plainly implies.

The same palpable error is also shown by the frequent use of the term "special contract," by which the courts seem to mean, as far as the contradictory, incoherent way in which they use the term admits of an understanding of their meaning at all, not only an express contract, but anything, *outside of the marking of the goods*, from which a contract can be implied. But it nowhere appears why they should eliminate the fact of the goods being marked for a particular destination, as the place to which expressly they are consigned and to be conveyed, as one of the ingredients — and, certainly, on the very face of it, a highly significant one too — from which a contract with the carrier who receives them for such conveyance may be implied that he is to carry them safely to such designated place. The result of their statements of the law, and of their use in the way in which they employ it, of the term "special contract," shows that, for some entirely unexplained reason, the implication arising from the goods being specially marked for a particular destination must always be ignored. This is the marked error in so many of the cases, as in Root *v.* The Great Western R. R. Co., 45 N. Y. 524, where the effect of the English cases has been so palpably misstated, because so grossly misunderstood.

[1] 45 N. Y. 524.
[2] *Ibid.*

from which a jury might be warranted in finding that the second company had contracted with the shipper, through his agents, the first company, for the safe carriage of the goods to their ultimate designated destination. These are simply ingredients for the court and jury in the construction of the contract. But in Root *v.* The Great Western R. R. Co.,[1] as is shown by the court, there was no evidence that the defendants "held themselves out as carriers for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that they were to carry the goods through;" but, on the contrary, the evidence showed that they were only to receive payment for carrying the goods over their own portion of the route; that, at the termination of their own route, they handed over the goods to another company, taking a receipt therefor, and all their power over the goods and custody of them ceased, and that they had no community of interest or partnership with the company to whom they, as mere forwarders from the termination of their own road, formally delivered the goods, receiving payment for the freight only to that point. This case is in all respects — with the additional point that in this case the company was an intermediate company, and not the original company which received the goods from the shipper — essentially identical with Van Santvoord *v.* St. John,[2] which latter case, as we have seen, is in perfect accord with the English cases, and expressly distinguishes and sustains Weed *v.* Saratoga, &c. R. R. Co.,[3] a case, in its turn, virtually identical with the English case, with which it was *contemporaneously decided*, Muschamp *v.* Lancaster Ry. Co.;[4] the ruling of Rolfe, B., in which latter case, has given rise to so great a misunderstanding in this country of what the English cases really hold in the matter.[5]

Root *v.* United States Express Co.[6] is another well-decided New York case. There the defendants, whose line extended only from Chicago to New York, gave a receipt for a package which they were to forward to Dalton, there being an express agreement that they were not to be held liable, "except as forwarders only." The defendants having proved that they carried the package safely to the termination of their own route, New York, and having there duly forwarded it for Dalton by the Adams Express Co., were

[1] 45 N. Y. 524.
[2] 6 Hill, 158.
[3] 19 Wend. 534.
[4] 8 M. & W. 421.
[5] Aside from the great misapprehension of the effect of the English cases in some of the American cases which we have examined, — notably in Root *v.* The Great Western R. R. Co., 45 N. Y. 524, — we feel quite satisfied that, on the "special" (*particular, not general*, simply) facts in these latter cases, there is not one of them which we have so far examined in this connection but what would have been sustained in England, under the law, as well-decided there, — including, as well as the others, Van Santvoord *v.* St. John, 6 Hill, 158, and Root *v.* The Great Western R. R. Co., 45 N. Y. 524.
[6] 48 N. Y. 462.

held to have performed their contract. The charge made by the defendants was held to be but a reasonable charge for the conveyance of the package to New York; and — we think with greater wisdom than the House of Lords manifested in Bristol, &c. Ry. Co. *v.* Collins,[1] where they construed to send as, not to forward, but to carry — the court held "to forward" meant not to carry but to send; a decision, we think, which goes some way towards showing the unsoundness of the construction of "to send" by the House of Lords.

In Root *v.* United States Express Co.,[2] the court below, forgetting the rule that "there are no degrees in secondary evidence," improperly rejected evidence that was clearly admissible. On this ground as well as that the defendants were liable for the safe carriage of the parcel over the entire route, the decision of the court below was very properly reversed.

In Babcock *v.* The Lake Shore R. R. Co.,[3] we find the court[4] repeating their inaccurate statements, on which we have commented so fully.[5]

[1] 7 H. L. Cas. 194.

[2] 48 N. Y. 462.

[3] 49 N. Y. 491, 495.

[4] Citing Redfield on Carriers, § 181, and Root *v.* The Great Western Ry. Co., 45 N. Y. 524.

[5] Thus they say: "Had the goods been received without a special contract, a contract would not have been *implied* [used conversely to "special"], on the part of the railway company, to carry the goods, or provide for their carriage, beyond the terminus of their road. Their whole duty would have been performed by transporting them to the extent of their own route, and delivering them to the next connecting carrier; that is, the railway company would have been liable as a carrier over its own road, and as a forwarder from the terminus of its line. This is the recognized rule in this and other States, although it is otherwise in England." In this extract "special contract" is used as the equivalent of *express* contract, and the conclusion here would be, that in this country the holding has generally been, that only by an *express* contract can carriers bind themselves beyond their own route. This, indeed, is piling Pelion on Ossa! Very clearly no such absurdity as this is sustained by the English cases, and the New York court will, we take it, find very few American cases which will justify the assertion that it is the recognized rule in this country that there can be no such contract except as the result of an express agreement. In the uncertain manner in which the term "special contract" is used by the text-writers, and in many of the cases, it is not singular that the New York Court of Appeals should have been led into such an error. The English and American cases alike hold that such a contract may be either expressed or implied; and we find so far that practically there is really no difference in their holding as to the facts and circumstances from which such a contract is to be implied. Where, as in Babcock *v.* The Lake Shore Ry. Co., 49 N. Y. 491, the written contract expresses that the goods are deliverable at the terminus of their own railway, and freight is paid to that point, and to that point only, the goods being only deliverable there on the freight and charges being paid, there is no room for an implication of a contract to carry them further. With regard to their criticism of Bristol & Exeter Ry. Co. *v.* Collins, 7 H. L. Cas. 194; s. c. 5 H. & N. 969, which was a question as to the construction of a written contract, if the House of Lords were right — doubts with reference to which we have already expressed — as to their construction of the contract, as an express contract with the first company for the carriage of the goods over the entire route, then it is quite clear that that expressly contracting company would be alone liable, whether under the decisions in England or here, in an action under the contract for the loss of the goods over any portion of the entire route, where there is no other portion of the contract exempting them from such liability. In Condict *v.* The Grand Trunk Ry. Co., 54

Berg *v.* The Narragansett Steamship Co.[1] is another case which, like so many of the other cases we have examined, while superficially appearing as though opposed to the English cases, is really decided in the strictest accordance with them. The head-note, in the stereotyped way, is: "A common carrier is not, in the absence of a special contract, liable for goods beyond his own route, although he receives them marked for a particular destination." Yet in this case, which is essentially the same case as Muschamp *v.* The Lancaster Ry. Co.,[2] the carrier, as in that case, who had received the goods "marked for a particular destination," *was so held liable.* The next head-note is: "Such a special contract may, however, be shown by the recitals in the receipt for the goods, and the manner in which the list is made up, and also from the fact that a through freight is charged, and that the connecting carriers have a contract with each other by which to carry freight through for a single price to be divided between them." But why each of these incidents in the case is to be considered important in showing that there is such a *special contract*, — which, in this case, means a contract to be *implied* from the circumstances, — and the certainly not less important fact that the goods are received for the purpose of being carried to the place to which — to indicate that fact — they are specifically addressed, is to be neg-

N. Y. 500, 502, where again a misapprehension of the nature of the English decisions, similar to that which we have pointed out in the other cases, is manifested, the decision, although nominally repudiating, virtually follows, Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421. In Condict *v.* The Grand Trunk Ry. Co., 54 N. Y. 500, the form of the railway receipt is not given, but a contract was implied to carry the goods to Chicago, from the facts in the case, which were that the goods were received by the defendants, marked for Chicago, and at a rate "specified of 64 cents *per* 100 pounds for the whole distance;" and the defendants were held liable for the goods, although they were lost by an accidental fire after they had reached the terminus of the defendants' own immediate route. This case, in its actual holding, is not unlike the previous New York cases, — Weed *v.* Saratoga, &c. R. R. Co., 19 Wend. 534, and Hart *v.* The Rensselaer, &c. R. R. Co., 4 Seld. 37, — which are so clearly in accord with the English cases, and which have been in effect distinguished and approved in the later cases, particularly in that case which has been, as we have shown, improperly considered as establishing a doctrine opposed to the sound holding of the English cases; Van Santvoord *v.* St. John, 6 Hill, 157.

In Hinckley *v.* New York Central R. R. Co., 56 N. Y. 429, the court say: "We have held that where a common carrier has received freight for transportation, under a special contract limiting his liability at common law, and by which he has undertaken for an agreed compensation to carry the goods to the termination of his route, and then to deliver to another carrier, his duty will end when the goods have reached that terminus, and have been delivered to another carrier." This is perfectly good law, and is no more opposed to the holding in the whole series of well-decided English cases upon the question, from Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421, down, than is that other English case (Garside *v.* The Trent Nav. Co., 4 T. R. 581) which Judge Redfield cites (Redf. on Carriers, § 181; 2 Redf. on Railways, p. 131, 6th ed.) incorrectly as being opposed to them. Hinckley *v.* New York Central R. R. Co., 56 N. Y. 429, is well decided on the same principles that Garside *v.* The Trent Nav. Co., 4 T. R. 581; Babcock *v.* Lake Shore R. R. Co., 49 N. Y. 491, and that class of cases are, under an express agreement showing that at the termination of their own route they were to assume the character of forwarders only.

[1] 5 Daly, 394.
[2] 8 M. & W. 421.

lected, can only be explained on the ground of their mistakingly treating the English cases as holding that such evidence is conclusive, instead of merely *primâ facie*, evidence — as far as in the particular case it may go — of such an undertaking or implied contract.

The case is even a stronger one than Muschamp *v.* The Lancaster Ry. Co.;[1] for while in this case, as in Muschamp *v.* The Lancaster Ry Co., there was the additional evidence, strengthening the implication, from the address of the goods, of there being one entire contract for the whole route — of one entire charge for the through freight; in this, the New York case, unlike the English case, it was affirmatively proved that though a through freight was to be received, it was to be "apportioned and divided between the companies;" the implication, therefore, not being as strong as in the English case, where there was nothing to indicate that the whole through freight might not have been for the originally receiving and contracting company. And yet, in this case, the goods being received on board the boat for Boston, as the goods in the English case were received for their marked destination; the defendants' agent in this case, like the defendants' agent in the English case, "gave no notice or intimation at the time that defendants' route terminated" short of the ultimate destination as *per* the receipt of the so-addressed goods, "nor was that fact in any way brought to plaintiff's knowledge prior to his loss;" the decision was precisely the same as in the English case, namely, that the originally receiving and contracting company were liable, on their implied contract, for the loss of the goods before they reached their ultimate destination of address and contract, even though the goods had been safely conveyed by the defendants over their own immediate route, and there safely delivered to the connecting company. In this case too, as in the English cases, there seems to have been no prepayment of the freight to the defendants, but it was to be collected at the other end of the route, — "the through freight for the entire route being specified and *charged*." As not only the principal, but all the material facts, in the two cases, are to all intents identical, the sound holding in Muschamp *v.* The Lancaster Ry. Co.[2] being so clearly affirmed by the holding in Berg *v.* The Narragansett Steamship Co.,[3] the comments (which we quote in our note below) in the latter case upon and deductions from some of the other New York cases, will show how difficult is the eradication of error, even from the minds of those whose own decision should have given them a better appreciation of truth.[4]

[1] 8 M. & W. 421.
[2] *Ibid.*
[3] 5 Daly, 394.
[4] They say (at p. 395): "In Foy *v.* The Troy & Boston R. R. Co., 24 Barb. 382, it was held that where property is

The cases in the State of Maine are also cited[1] as being opposed to the doctrine of the English cases. The first of these is Perkins *v.* Portland, &c. R. R. Co.[2] In this case, construing the term "special contract" to mean *express* contract,[3] it was distinctly claimed that, "without *an express contract*, the carrier is only liable to the extent of his own route, and for safe storage and delivery to the next carrier." For this utterly unsound position Redfield on Railways, and some of the New York and Massachusetts cases which we have examined, are cited, as well as Garside *v.* Trent & Mersey Trans. Co.;[4] but, as we have shown, while Redfield entirely misstates the law in the matter, not one of the New York or Massachusetts cases cited sustains the position for which they are cited. In the Maine case itself, the contract was an express one, and the court held that the company were liable for the carriage of the goods over the whole route with reference to which they had contracted.[5]

received by a carrier for transportation, addressed to a person beyond the route of such carrier, in the absence of proof an agreement will be inferred on his part to deliver the property as directed. The contrary view is maintained in Wright *v.* Boughton, 22 Barb. 561, where it is held that a copy of an address upon a delivery receipt was mere matter of description, and not an agreement. *But the rule is now settled that a common carrier is not liable for loss of goods beyond his own route, although he receives them marked for a particular destination.*" For this monstrously absurd conclusion Root *v.* Great Western R. R. Co., 45 N. Y. 524; Van Santvoord *v.* St. John, 6 Hill, 158; Dillon *v.* New York & Erie R. R. Co., 1 Hilt. 231; Kreuder *v.* Woolcott, 1 Hilt. 223, are cited; and this is essentially what in the cases and by the text-writers is called the "American rule." If a proper analysis of these cases do not of itself un-"settle" such a "rule," then it is clear that a few cases like Berg *v.* The Narragansett Steamship Co., 5 Daly, 394, so thoroughly harmonizing with the well-decided English cases on the subject, must certainly have that effect. It expressly held, as does Muschamp *v.* The Lancaster Ry. Co., 8 M. & W. 421, that upon such evidence "the question of defendants' liability was properly submitted to the jury," and their finding on such evidence that the defendants *were liable* was unanimously affirmed by the New York Court of Common Pleas. This case was approved in Weil *v.* The Merchants' Despatch Trans. Co., 7 Daly, 456, 460, where, in the usual spirit of those cases, it is said of the prior case that it was there decided "that a carrier of goods is not liable for loss beyond his own route unless by *special agreement*. In that case there were facts from which such an agreement might have been *inferred*." By "special agreement" here, then, is simply meant that the carrier is not so liable except by *contract*, and that such a contract may be either expressed or implied, — inferred from the facts; such, for instance, as those which alike existed in the two well-decided cases of Berg *v.* The Narragansett Steamship Co., 5 Daly, 394, and Muschamp *v.* The Lancaster Ry. Co., 8 M. & W. 421. In Weil *v.* The Merchants' Despatch Trans. Co., 7 Daly, 456, itself, there was an express contract by the defendants for the carriage and delivery of goods to a named point, to which point they safely carried and delivered the goods, and received their payment for the freight to such point only. Of course, under such circumstances, there was no ground for holding that they were liable for the subsequent independent acts of connecting carriers, to whom the goods were duly delivered by the defendants at that point. So much for the New York cases on the subject, which certainly do not seem to affect the English cases on the subject any more than is done by the Massachusetts cases previously examined by us. See *supra*, p. 105 *et seq.*

[1] See note to Wells *v.* Thomas, 72 Am. Dec. 250; note to Michigan Central R. R. Co. *v.* Mineral Springs Manuf. Co., Book xxi. U. S. 298.

[2] 47 Me. 573.

[3] See at p. 586.

[4] 4 T. R. 581.

[5] In so deciding they say: "It is quite clear that a common carrier, if a natural

In Skinn *v.* Hall,[1] it is said: "Unless by *special contract*, a common carrier is not liable for goods lost beyond the end of his route." In this case there was a *special contract*, evidenced by

person, may contract to carry persons or property beyond his own line, and thus make the carriers upon the connecting lines his agents. In such case he is responsible for any loss or injury upon any part of the route. Whether the same rule applies to corporations chartered as common carriers upon lines designated in the statutes by which they are created, is not so clearly settled. In England the law is well established by a series of decisions not only that the same rule applies to railway companies as to natural persons, but that in either case if a common carrier receives goods marked to be delivered at a place beyond the limits of his own line, he undertakes, *primâ facie*, to carry the goods to their destination, and is bound to do so, unless he limits his responsibility by express agreement or notice at the time the goods are received [*or there are other facts in the case to rebut the inference in cases where such inference arises*]. This doctrine has been denied in this country; and the rule has been held to be, when a railway company receives goods marked for delivery at a place situated beyond the line of their own road, that they are only bound, in the absence of any special contract, to transport and deliver them, according to the established usage of the business, to the carriers of the connecting line, to be forwarded to their ultimate destination. In all these cases it is decided or admitted that a railroad company may *by special contract* [the italics are their own] bind themselves to deliver merchandise at a place beyond the line of their own road; and that in such case they are bound as common carriers for the whole route, and can exonerate themselves only by a delivery at the place of destination." For these propositions a number of the cases which we have examined are cited, and a few others yet to be examined by us. As companies, then, may be so bound by special contract, which, as all the cases show, and is purely elementary, may arise either by express agreement or from circumstances from which a contract may be implied, why, in the absence of an express contract, should the important fact that the goods have been received for transportation to a destination pointed out by the address on the goods as the place to which they are consigned, and to which they are intended to be conveyed, be eliminated from the facts and circumstances which show what it is the intention of the parties that the contract is to be, any more than any other equally or less important fact tending to show the nature of the contract should be eliminated? In answer to this it may be said, *first*, that there is no reason whatever for such elimination; and, *second*, so far as we have yet examined, that fact — *any more in the American cases than in the English* — has not in one solitary case been eliminated in an attempt to arrive at a construction of the contract in the particular case. If we do, and when we do, find such a badly-decided case, we shall not fail to notice it. So far, at least, as we have now carried this investigation, we have found not one of the American cases where the important fact of the receipt by carriers of goods to be conveyed to a destination indicated by the address of the goods has in principle less weight attached to it than in any of the English cases, including Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421. In the Maine case it is said, on a collateral point, "If there was no express authority it might have been implied from a mutual arrangement for the carrying business among all the carriers between the point where the goods were received and the place of delivery. Where such an arrangement actually exists, there is an implied authority on the part of the agents of each company to make a contract that shall bind them all." And in this case, though it is singularly said by the court (at p. 592) that the agent has no authority, "express or implied," to make the contract for the conveyance of the goods over the entire route, yet it was held that by the acts of the company he *had* such an implied authority, which estopped them from denying that he was "acting within the scope of the authority conferred upon him by the company," and they were held liable for the carriage of the goods over the entire route. The *contract* (*or special contract, if you will*) of the company themselves through their agent may then quite as well be inferred or implied from the surrounding facts, as the *authority* of the agent, and in either case all of the facts which tend to show what the contract or authority is in the particular case should be considered. This, in effect, is simply all that is held in the English cases; and, as above intimated, is a principle which is as much acted upon on the subject we are considering by the American cases as by the English.

[1] 60 Me. 477, 478.

the receipt given limiting the defendants' liability to the end of their own route, and the delivery of the money to a "connecting express company." The "special contract" last referred to was an *express* contract of the clearest possible kind. If, by the use of the term "special contract" in the preceding sentence, is intended also to mean *express* contract, or anything more than is covered simply by the word "contract," without that constantly reiterated word "special;" then, it is scarcely necessary to say, such a position is entirely incorrect and unsupported either in England or America. So, again, if it be imagined that there is any case in England which decides, *contra* to the principle of this Maine case, that the mere receipt by carriers of goods marked to an ultimate destination, with an express contract that the receivers shall be liable only over their own immediate route, and not over connecting roads beyond it, makes them liable over the whole route; then the doctrine of the English cases is greatly misunderstood. The case of Bristol & Exeter Ry. Co. *v.* Collins[1] comes nearest to such an unsound doctrine, but does so, as we have shown, not only against the unanimous decision of the Court of Exchequer Chamber, and against the answers of four judges out of six, but by what we think was really a perversion of the express written contract with which they had to deal; and not reporting to hold any doctrine *contra* to that of the Maine case. But, assuming that the construction by the House of Lords of that contract was correct, then the case would simply hold that the contracting company had not limited the express liability which they had assumed for the carriage of the goods over the entire route.[2]

[1] 7 H. L. Cas. 194.

[2] In Inhabitants of Plantation No. 4 *v.* Hall, 61 Me. 517, the Maine court make a still plainer confounding of what they call "a special contract" with an *express* contract, and, therefore, make their confusion of terms and misstatement of law still more apparent than before. Referring to the Massachusetts case we have fully considered, *supra*, p. 112, they say: "In Burroughs *v.* Norwich, &c. R. R. Co., 100 Mass. 26, it was held that a corporation established to transport goods for hire between certain places, and receiving goods directed to a more distant place, is not responsible beyond the end of its own route, as a common carrier, but only as a forwarder, unless it make an *express agreement* extending its liabilities." If this statement of the law, in this comparatively late case, by the Supreme Court of Maine, as made by Appleton, C. J., in delivering the unanimous judgment of the court, — the other members of it, five judges being present, *expressly* concurring in it, — and with reference to which they say (at p. 519): "Such, unquestionably is the law," be an authoritative and authorized exposition of what they are continually calling "The American rule" in the matter, then, it is only necessary to say that "The American rule" is not only very bad law, but that it is very badly supported by American decisions themselves. We have not yet found one case among those we have examined, — notwithstanding the mystical, uncertain manner in which so many of them use that term, "special contract," — the *ratio decidendi* of which justifies the statement of the Maine Supreme Court that that which they deduce from the Massachusetts case which they cite, is "unquestionably the law!" And we are inclined to doubt, if, in the further examination we are to make, we find one solitary case, the reasoning and conclusion in which will warrant such a conclusion. The Maine case itself, like the previous

We take up next the Connecticut cases. Hood *v.* The New York & N. H. R. R. Co.[1] is the first of these. This was the

one from that State, simply holds, where an express company "expressly" excluded themselves from liability as carriers beyond their own route, that they were not liable outside of the clearly expressed terms of the written contract.

It seems almost superfluous to point out, after all we have written, that the great mass of the American cases correctly hold, in perfect accord with the well-decided English cases, that a carrier may contract, *either expressly or impliedly*, for the conveyance of goods beyond his own immediate route, so as to make himself personally liable for the safe conveyance of the goods over the entire route with reference to which he expressly or impliedly contracts.

There are many cases in which the term "special contract" is used in a sense which almost implies that it is used as the equivalent of "express contract;" but in no other case have we found this radical error so glaringly appear as in the Maine case, where the term "express," being substituted for the "positive" of the Massachusetts case, shows the mistake more clearly. But, to show the unsoundness of what the Supreme Court of Maine unanimously declare "unquestionably is the law," it is not necessary to go beyond their own decisions. In the subsequent case of Grindle *v.* Eastern Express Co., 67 Me. 317, 320, they, with the same unanimity as before, say: "The defendants do not deny their receipt of the money in the capacity mentioned. Being such carriers, and their general obligation depending upon their public profession, they were bound, in the absence of any *special agreement*, to receive the money and carry and deliver it, within a reasonable time, at whatever place directed within the route which they hold out to the public as theirs, and no further. There, their common-law liability ceases. They might contract to carry further to any point beyond their regular line; or might simply undertake to deliver to a connecting carrier; in which latter event their liability would cease with a safe carriage and prompt delivery; for they would then have done all the law and all their contract required. *The proof of a contract beyond their route should be clear.* BUT IT MAY BE EXPRESS OR BY IMPLICATION; *by direct or circumstantial evidence; by words, conduct, or usage.*" This judgment of the Supreme Court of Maine was delivered by Virgin, J., and was unanimously concurred in by the rest of the Maine Supreme Court judges, Appleton, C. J., who delivered the unanimous judgment of the same court in Inhabitants of Plantation No. 4, *v.* Hall, 61 Me. 517, declaring it to be unquestionable law that *such a contract could only be by "express agreement,"* being one of them.

The actual holding in this Maine case, as in the preceding cases we have examined from that State, is simply to the effect that where a carrier expressly contracts to carry goods to a designated place, and delivers them there, he has only the liability which is involved in his contract. The court make the extra-judicial observation that, "Receiving goods marked or directed to some point beyond their regular route is not *sufficient* evidence of an implied contract to carry them to that place;" for which they cite Pendergast *v.* Adams Express Co., 101 Mass. 120, stated by us, *supra;* but, as we have there shown, in that case there was an express contract that the liability of the receiving company should not extend beyond their own immediate route, and, therefore, the question as to what was involved in or implied by the receipt for carriage of goods specifically marked for the place for which they were consigned, was really not in the case at all. If by "sufficient" evidence, the Maine Court meant *conclusive* evidence, then they were right; and that has not to be added to the other egregious error they made of unanimously declaring in one case, as we have shown that they did, that such a contract could only be made by "express agreement;" and then, in another case declaring, again unanimously, that that which they had pronounced as "unquestionably" the law, that such contract could only be made by "express agreement," was *not* unquestionably the law, but that such contract "may be express *or by implication*," and [*it may be proved*, they mean] "by direct or circumstantial evidence; by words, conduct, or usage." This is exactly the holding of the English cases, and while they do not hold that the goods being received for carriage so marked, is *sufficient* evidence (treating *sufficient* as a synonym for *conclusive*) of an implied contract to carry the goods to their marked destination under all circumstances; they do hold, and very properly hold, that that is one fact, from which, under the surrounding circumstances, a jury may be warranted in inferring such a contract. And so far, in our examination of the American cases which are usually cited as holding a doctrine opposed to this, we have found none of these cases, including the Maine Supreme Court

[1] 22 Conn. 1.

case of the carriage of a passenger, under a through ticket, from New Haven to Collinsville. The defendants' railroad extended to Farmington, where it connected with a stage to Collinsville. The ticket that was sold in this case showed an express contract to carry the plaintiff "from New Haven to Collinsville, by railroad and stage," for which one through rate was paid by the plaintiff to the defendants. The plaintiff, having been injured on the connecting stage route, sued the defendants, and on the trial, the entirety of this contract does not seem to have been even questioned; but it was claimed that the company, under their charter, had no power to make such a contract. The jury found for the plaintiff. On motion for a new trial, the court held that "there was some evidence of a promise; enough, perhaps, to make a slight *primâ facie* case." The court, while saying that the "ticket expresses no contract," add, "Taken in connection with the payment of the money for the entire distance, it would furnish some evidence of a promise to transport the holder of the ticket over the entire line." As there was no limitation whatever on their "promise," and as it was on a sufficient consideration, the *desiderata* for a contract seem to be all there; even though the contracting defendants had no "connection with [*ownership of*, they evidently mean] the stages." The English cases seem to be approved, thus: "We are aware, that in the cases cited from the English books, it seems to be held, that if a railroad company receives, at its depot, goods marked to be forwarded beyond its own road, and even beyond any other railroad, this is *primâ facie* evidence of a contract to carry the goods to the place of destination. We will not say, that in these English cases, since there was no evidence on the part of the defendants to disprove the *primâ facie* case, the defendants were not rightly subjected in damages, for a loss beyond their road." They also, in the same way, distinguish Weed *v.* Saratoga, &c. R. R. Co.,[1] on the ground, as stated by Rolfe, B., in Muschamp *v.* Lancaster Ry. Co.,[2] that the evidence there, too, did make out a *primâ facie* case, and suggest, as a possible answer to such a *primâ facie* case, the evidence of established usage. But, by a mere majority of the judges (three to two), reversing the decision of the court below, they held, on the ground that "passengers take care of themselves," that even though the doctrine of the English cases was right as to *freight*, it did not follow that it would also apply to *passengers*. Though why the express contract in this latter case would not apply to passen-

cases themselves, which establish a different doctrine, or which at all successfully controvert the sound holding in the English cases on the subject.

[1] 19 Wend. 534.
[2] 8 M. & W. 421.

gers for an injury caused to them by the default of the defendants, under their contract, as well as the implied contract would apply to the freight in the English cases, is not clear. A new trial was, however, ordered, when the jury again found for the plaintiffs; it being shown, in addition to the previous evidence, that, in effect, their general usage was to do that which in this case they had specifically done. On a motion for another new trial, the court entirely abandoned their previous position, but held, again by but the three judges as in the previous case, that the defendants had no power to make such a contract, and were not estopped from so showing. A third trial was ordered, but there seems to be no further record of the case, except as is contained in 23 Connecticut, 609, where a bill filed on the ground that the defendants were so estopped in equity, if not in law, was dismissed; which probably put an end to the case.[1]

In the next Connecticut case,[2] the same three judges[3] adhered to their previous decision so emphatically condemned in Perkins *v.* Portland, &c. R. R. Co.,[4] stated in our note. On that ground alone there can scarcely be a question, as intimated in the Maine case, that they stand alone; opposed as they are by the uniform law in the other States of the Union as well as in England.

This is really the first decision we have found, in which, by even a majority of the court, the, to our mind, unquestionably sound decisions in England on the subject (independent altogether of the question as to the power of a railway company to contract for carriage beyond its own line) are actually departed from. The decision of the case by the majority of the court mainly rests on their second decision in Hood *v.* New York &

[1] Commenting on the ultimate ground upon which the case was decided, it is said of it in one of the Maine cases we have examined (Perkins *v.* Portland, &c. R. R. Co., 47 Me. at p. 590): "In the case of Hood *v.* New York & N. H. R. R. Co., 22 Conn. 502, it was held that a contract to carry a passenger from New Haven to Farmington on their railroad, and thence to Collinsville by stage, was not binding on the company, on the ground that the company had no authority, under their charter, to make a contract to carry a person beyond their own line. We are not aware that the doctrine has been carried to that extent in any other State. Upon a careful survey of all the authorities, we are satisfied that a railway company may be bound by a special contract, to transport persons or property beyond the line of their own road. In granting the charter, all incidental powers which are necessary to the proper and profitable exercise of those which are specifically enumerated may be presumed to be conferred by implication. The business of common carriers between different places is intimately interwoven, branching off into innumerable channels. And it is often of great public convenience, if not of absolute necessity, that several companies should combine their operations, and thus transport passengers and merchandise by a mutual arrangement, over all their lines upon one contract, for one price. In such cases, each is held liable for the whole distance. Fairchild *v.* Slocum, 19 Wend. 329; F. & W. Railroad Co. *v.* Hanna, 6 Gray, 539."

[2] Elmore *v.* The Naugatuck R. R. Co., 23 Conn. 457.

[3] Waite, C. J., and Hinman, J., holding the opposite and incomparably the sounder opinion.

[4] 47 Me. 590.

N. H. R. R. Co.,[1] as stated by us above; but now they abandon the distinction between passengers and freight made by them in their first decision in that case;[2] and not only so, but abandon as well their admission "that if a railroad company receives, at its depot, goods marked to be forwarded beyond its own road, and even beyond any other railroad, this is *primâ facie* evidence of a contract to carry the goods to the place of destination;" and, in effect, that where "there was no evidence on the part of the defendants to disprove the *primâ facie* case" (as in Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421), the defendants were rightly subjected in damages, for a loss beyond their road.[3]

In Elmore *v.* the Naugatuck R. R. Co.,[4] the defendants' own immediate road extended only to Bridgeport, where, among other connections, they had connection by railway and steamboat to New York. They advertised that freight would be way-billed from each station for New York, New Haven, and Bridgeport; adding, "The facilities for *transporting* freight having been greatly increased, shippers may rest assured that their goods will be taken through *to their destination* with despatch." Leather was delivered by the plaintiff to the defendants marked to consignees at New York, and for which a receipt was given, acknowledging that it was "Received for transportation in good order, consigned to C. & M., New York." The goods were lost after they had been transshipped by the defendants at Bridgeport for New York. The court, on the trial among other things, charged the jury that the liability of the defendants rested upon what they should find to have been the real contract between the parties in respect to the transportation of the plaintiff's goods. That independently of any special contract, the defendants were not bound to carry the goods beyond their own road, whether they were marked or consigned to a place beyond said limits or not. That the question for them to determine was, therefore, whether in fact, and in law, the defendants contracted to carry the goods to New York, or whether they only contracted to carry them to Bridgeport, and from thence to forward them by steamers, or some other regular conveyance. That, in case they contracted to carry them to New York, they were liable, otherwise not, as it appeared the goods were destroyed after the safe arrival of them at Bridgeport. And then, in accordance with what the three judges who constituted the majority of the court in the previous case, had themselves in effect admitted, "that the delivering of the goods to the defendants for transportation, consigned to New York, and taking the re-

[1] 22 Conn. 502.
[2] *Ibid.* at p. 15.
[3] *Ibid.* p. 14.
[4] 23 Conn. 457.

ceipts from the defendants, without anything farther between the parties, was *primâ facie* a contract to carry the goods to the place of destination according to the marks and directions upon them." The jury found for the plaintiff. The majority of the court set aside the verdict, and ordered a new trial. In doing so, in addition to holding that the defendants' power was limited within the express terms of their charter, they relied largely on the Massachusetts decision in Nutting *v.* Conn. R. R. Co.,[1] but which case, as well as another of the cases relied on, Van Santvoord *v.* St. John,[2] is plainly distinguishable, as we have shown, from the English cases. But they went beyond the cases they cited, and held that the court below erred in instructing the jury that the delivery of the goods to the defendants for transportation, and their giving a receipt to that effect, was *primâ facie* evidence of an undertaking to carry the goods to New York; that being the place of their ultimate destination. And they did this too, although in the previous case of Hood *v.* New York & N. H. R. R. Co.[3] (the same judge, Ellsworth, J., delivering the judgment in both cases), they, in effect, declared that such evidence "is *primâ facie* evidence to carry the goods to the place of destination," and that, as there was no evidence on the part of the defendants to disprove the *primâ facie* case, the defendants were rightly subjected in damages, for a loss beyond their road. And, on page 15 of the same case, we find them declaring further, in express opposition to their holding in the later case, that in Weed *v.* Saratoga, &c. R. R. Co.,[4] as in Muschamp *v.* Lancaster Ry. Co.,[5] "It is a *primâ facie* case merely!" And yet, in the later case they pronounce it error, in a judge (Hinman, J.), who, consistently differing with their conclusions in both cases, yet charged the jury to the same effect, and in virtually the same language, as they themselves had held in the previous case. There is nothing either in their reasoning; in their admittedly wrong decision in one of the two points involved in the case, or in their contradictions and inconsistencies in reference to the other, to entitle their decision to any special weight. On the other hand, the dissenting judgment of Chief Justice Waite, in which he agrees with Hinman, J., with which we entirely concur, is, to our mind, conclusive in its reasoning, and presents the only correct appreciation of the effect of the English decisions we have yet found in our examination of the cases decided in this country.[6]

[1] 1 Gray, 502.
[2] 6 Hill, 157.
[3] 22 Conn. 14.
[4] 19 Wend. 534.
[5] 8 M. & W. 421.

[6] We cannot do justice to Chief Justice Waite's admirable judgment by any synopsis of it, or extract from it, and as it is of the greatest value in showing what the law in the case really is, we set it out in

The Naugatuck R. R. Co. *v.* The Waterbury Button Co.,[1] the next Connecticut case on the subject, and which follows Elmore full in this note. Waite, C. J.: "The defendants, in this case, gave public notice in the newspapers 'to freight shippers,' that freight would be 'way-billed from each station' on their road, 'for New York, New Haven, and Bridgeport.' After this notice had thus been publicly given, the plaintiff delivered to them, at their station in Wolcottville, a quantity of leather to be transported to New York, for which they gave him two receipts. One was in these words: 'Received, for transportation in good order, from J. D. Elmore, five bales of leather, 1,297 lbs., consigned to Cook & Mann, N. Y.' To this receipt their company name was affixed by their agent. The other receipt was of the same tenor, differing only in the quantity of leather, and in the names of the consignees. The goods were transported to Bridgeport, placed on board a steamer, and afterwards destroyed by fire. The action was brought to recover for the loss. Upon this evidence, the judge, upon the circuit, instructed the jury that the delivery of the goods to the defendants, and taking their receipts for the same, without anything further between the parties, was *primâ facie* a contract to carry the goods to the place of destination, according to the marks and directions upon them. The jury having returned their verdict in favor of the plaintiff, it is now said that the instruction of the court, and the verdict of the jury, are both wrong. But to this assertion I cannot yield my assent. The receipts given by the defendants are undoubtedly evidence of a contract of some sort, and were so intended by the defendants when given. And if they do not import a contract to transport the goods to New York, what contract do they import? Not to carry to Bridgeport any more than to Waterbury, or any other place on their route. But, say the defendants, New York is beyond the termination of our road, and we could make no contract to carry beyond it. Why then did you publish to the world that you would 'bill' goods to New York if you did not intend to carry them there? And when the goods were delivered to you, consigned to merchants in New York, in compliance with your call upon freight shippers, why did you give your receipts for the goods, to be transported in good order, without specifying the contract you intended to make? Had the goods been consigned to persons in Waterbury, in Seymour, in Derby, or any other place on the line of the defendants' road, could there be a doubt but that receipts, like the present, would import a contract to deliver at the place designated? A delivery in such case at any other place would clearly be a violation of the contract. A delivery at Bridgeport would render the defendants as liable as a delivery in New York. The case of Nutting against The Connecticut River R. R. Co., is relied upon by the defendants as supporting their claim. 1 Gray's R. 502. But there is a material distinction between that case and the present. There a practice had existed for the defendants to carry goods consigned to New York, only as far as Springfield, the termination of their road, *and they were paid for carrying the goods only to that place.* In the present case, had there been a practice on the part of the defendants to transport goods no further than Bridgeport, and had the plaintiff paid them the freight to that place, such facts would have rebutted the *primâ facie* evidence furnished by the receipts alone, and have shown what the real understanding of the parties was. In the language of the charge, there would have been 'something more between the parties.' The principle laid down by the judge on the circuit, is in precise conformity with the English decisions, and is fully sustained by them. Such evidence is not considered as conclusive evidence of a contract to carry the goods to their place of destination, but merely as *primâ facie* evidence of such an undertaking, liable to be controlled by the other evidence in the case.

"But the main question involved is whether a railroad corporation has power to make a valid contract for the transportation of goods, to any place beyond the termination of their road. A majority of this court are of opinion that such a corporation has no such power, and upon that ground they hold the verdict to be wrong. That question, in my judgment, is one of very great importance in this country, covered as it is, with a vast net-work of railroads, constantly increasing in number, and moving annually an immense amount of freight to and from almost every part of the Union. If the present railroad corporations do not possess the power to make such a contract, as incidental to their general powers, in my opinion, the business wants of the community, and especially of mercantile men, must soon demand legislative interference and a grant of the requisite authority. Indeed, I do not see

[1] 24 Conn. 468.

v. The Naugatuck R. R. Co.,[1] is also virtually decided by a divided court, two of the judges only delivering the judgment; Hinman, Co., 8 M. & W. 421; Watson *v.* The Ambergate, &c. Ry. Co., 15 Jur. 448, and other English cases.]

"In the first case cited, a parcel was delivered to the defendants, directed to a person at a place in Derbyshire, beyond Preston, the termination of the defendants' road. The person who delivered it offered to pay for the transportation, but the defendants' book-keeper said it had better be paid by the person to whom it was directed. The parcel was carried to Preston, and there delivered to the next company on the route, and was afterwards lost. It was holden that the defendants were liable for the loss, and that the receipt by them, under the circumstances, was *primâ facie* evidence of a contract to carry it to the place of its destination. Lord Abinger, in the course of his remarks, said: 'The taking charge of the parcel is not put as *conclusive* [this word is accidentally omitted in the quotation, but is in the original, and is in italics there. AUTH.] evidence of the contract, sued on by the plaintiff. It is only *primâ facie* evidence of it; and it is useful and reasonable for the benefit of the public that it should be so considered. It is better for those who undertake the carriage of parcels, for their mutual benefit, that they should arrange matters of this kind, *inter se*, and should be taken each to have made the others their agents to carry forward.' And Rolfe, Baron, said: 'The construction we are putting on the agreement is not only consistent with law, but it is the only one consistent with common-sense, and the convenience of mankind . . . Any other construction would open the doors to incalculable inconveniences. All inconvenience is one way, and there is no authority the other way.' The principles recognized in that case were fully sanctioned in the next case cited. Earle, J., referring to the case, said: 'I think it was there properly decided, that where goods are received at one terminus for conveyance to another, the company are answerable for all the intermediate *termini*, and the receipt of such goods is *primâ facie* evidence of such liability. In the succeeding case, the defendants' counsel admitted that the principles recognized in those cases were so well settled that their correctness could not be impugned. They fully sustain both the charge of the court and the verdict of the jury, in the present case, and, in my opinion, are founded in good sense and the convenience of man-

how the great business operations of the country can safely be carried on without it. The question is not whether a railroad company can be laid under any obligation to transport goods beyond the line of their road, unless by their voluntary consent; but whether they can unite with other railroad companies having a continued line between two places, by which they can contract for the transportation of goods between those places. No company would naturally enter into any such arrangement unless for the promotion of their interests and increasing the legitimate business upon their road. And it is easy to conceive that such an arrangement in many cases might be made respecting the division of the freight money, and the speedy and safe transportation of goods, as would be highly beneficial to all concerned, and materially increase the business on their route. A merchant residing in Cleveland, Toledo, or Chicago, purchases goods in the city of New York, which he wishes to send to his place of business. He enters into a contract with a railroad company for their transportation not to any given point on the route, but for the whole distance. He delivers the goods to the company, and they are taken and locked up in freight cars. He does not accompany them, and often sees and hears nothing more of them until they are delivered to him at their place of destination. The cars in which they are placed are often run over roads belonging to different companies, to save the trouble and expense of a change of cars. If the goods are lost or damaged on their route, he ordinarily has no means of determining where, or in whose custody the injury accrued. The trouble and expense of ascertaining that fact, in many cases, would amount to more than the whole damage. As a prudent, cautious man, he would be unwilling to trust his goods to the custody of others, unless he could find some person or company that would be responsible for their safe delivery.

"But we are not left to mere speculation upon this subject. The question has repeatedly been before the higher English courts, and they have uniformly holden that railway corporations have power to enter into contracts for the transportation of goods beyond the termination of their roads, and that the receipt of them, marked for a particular place, is, *primâ facie*, a contract to carry to that place. Citing Muschamp *v.* The Lancaster Ry.

[1] 23 Conn. 457.

man, J., subsequently Chief Justice, differing with them, but considering himself bound by the decision of the court in the previous cases; and Waite, C. J., — probably for the same reason, — taking no part in the case. This case is, even more than the previous Connecticut cases, distinctly opposed to the holding in the English cases, and to the *ratio decidendi* of even the cases in New York, Massachusetts, and Maine, which are usually cited as establishing what is called "The *American* rule," but which, we think, should not be so dignified; but rather, as far as from our examination we are yet enabled to form an opinion in the matter, should more properly be designated "The *Connecticut* rule."

The facts in this case are even stronger than in the immediately preceding case. In this, as in that, the plaintiffs delivered, at the defendants' station, for transportation, goods for New York, marked for that place, to which they were consigned. The defendants transported them over their road to Bridgeport, where they shipped them on board a steamer, in which they were destroyed by fire. In an action against the defendants for the loss of the goods, it was also shown, as before, that the defendants advertised that they would "way-bill" freight for New York, and that "the facilities for transporting freight having been greatly increased, shippers may rest assured that their goods will be *taken through to their destination* with dispatch." Handbills to the same effect were distributed by the defendants along their line of railroad. It was, in addition, proved that the plaintiffs had been in the habit of sending their goods to New York "by the Naugatuck railroad ever since the road went into operation;" that the entire freight for the carriage of the goods to New York, from the station at Waterbury, where they were delivered to the defendants, was paid by the plaintiffs' agents at New York; that the defendants

kind, and I see no good reason for departing from them, sanctioned as they are by courts of the highest authority.

"But the case of Hood *v.* The New York & N. H. R. R. Co., is also relied upon by the defendants. 22 Conn. 1, 502. That was a suit brought to recover damages for an injury to the person; this is for the loss of goods. The judge who delivered the opinion in that case recognized the distinction. He says: 'But if we are wrong in this, it does not follow that the doctrine of the English cases, as to freight, is to be applied to passengers. Passengers can take care of themselves.' If a passenger is injured upon a railroad, he knows where the injury happened, and can generally ascertain without difficulty, what company is in fault. Not so with the owner of goods which have been damaged on a long railroad route, owned by several companies. The decisions in that case were made upon decided opinions of the members of this court, and are of no binding efficacy beyond the questions there involved. And if they are to control the law in this State, in relation to the transportation of passengers, they do not preclude us from deciding questions relating to the transportation of freight, upon principle and authority. For these reasons I think the verdict of the jury ought not to be disturbed." Dissenting judgment of Waite, C. J., in Elmore *v.* The Naugatuck R. R. Co., 23 Conn. 479 *et seq.*

were engaged in the business of transporting freight and goods by their railroad, and had received freight from the plaintiffs, and other parties in Waterbury, for transportation, directed to New York, in the same manner as in this case, for a long time prior to the loss; *and that the defendants had never made any demand for the freight of the lost goods from Waterbury to Bridgeport.* On all this evidence, which is certainly much stronger, in some respects, than in Muschamp *v.* Lancaster Ry. Co.,[1] or in Weed *v.* Saratoga, &c. R. R. Co.,[2] with reference to which cases it was admitted by the Connecticut court itself, in Hood *v.* New York & N. H. R. R. Co.,[3] — Ellsworth, J., delivering the judgment in that case as in this, — that the facts in those cases *did* make out "a *primâ facie* case merely;" it was held, in this case, that the plaintiffs *did not* make out a *primâ facie* case, and a nonsuit was sustained. We are quite of the opinion, with the plaintiffs' counsel in the case, that, with the other facts in the case, "the omission of the defendants to ask or claim pay for the transportation of the goods from Waterbury to Bridgeport, was a fact furnishing strong evidence, and from which the jury fairly might have inferred that the defendants' contract was to carry to New York; and that the defendants knew, and had acted upon the idea, that they were not entitled to compensation, unless they fulfilled their contract." And we think that had the question been brought up in the shape of an action for freight from Waterbury to Bridgeport, the entirety of the contract by the defendant to "*take*" the goods "*through to their destination*" would have been so apparent as to have added still further confusion to the decisions of even the Connecticut court on the question; and, as far as the question was one for the jury, we doubt very much if any intelligent jury, in England or in this country, would find, on such facts, otherwise than the successive juries did find in Connecticut in this case, and in Hood *v.* N. Y. & N. H. R. R. Co.[4]

The next Connecticut case on the question is Converse *v.* Norwich & N. Y. Trans. Co.,[5] which purports to follow the previous cases. The defendants ran their line of steamers from New York to New London, where they connected with the New London Northern R. R. Co.; Stafford, Connecticut, being on the line of railroad. Goods were received by the defendants, marked for conveyance to Stafford, for which they gave a receipt, dated at New York, as follows: "Received from P., in good order, on board the Norwich and Worcester boat, bound for Stafford, Conn.,

[1] 8 M. & W. 421.
[2] 19 Wend. 534.
[3] 22 Conn. at p. 15.
[4] 22 Conn. 1, 502.
[5] 33 Conn. 166.

the following packages," &c., marked for the consignees, "Stafford, Ct." The goods were carried by the defendants to New London, where they were destroyed by fire. One entire charge was made by the defendants for the freight of goods from New York to Stafford, the bills being made out by the defendants, "For transportation of merchandise from New York to Stafford, *via* New London;" and such bills were paid by the plaintiffs and others for the conveyance of goods from New York to Stafford. In an action against the defendants on their contract to carry the goods from New York to Stafford, the jury found for the plaintiffs. The court, following their previous decisions, held, in antagonism to the solid body of law, English and American, that the company had no power to make a contract for carriage extending beyond their own immediate route. But, outside of, and going farther than this, they seem to hold — nay, they unquestionably do hold[1] — that "the law implies, from the delivery and acceptance of goods for carriage, a contract to carry according to the usage of the carrier's business; and if marked for a point beyond his terminus, to deliver there to the next carrier on the route;" and — here is the remarkable holding! — that "*in the absence of any express contract*,"[2] *nothing else can be implied*, no matter what the circumstances may be, from which, in England, or, we should hope, in any other State in the Union than Connecticut, a "special" contract might be implied by carriers to carry the goods beyond their own immediate route. If this is the *Connecticut* rule, we should hope that it could scarcely be called "*The American rule!*"

Under this decision the doctrine that "contracts are express or implied" must be expurgated, and re-appear as "contracts may be express or implied, except those of a carrier to carry goods beyond his own immediate route, which can under no circumstances be implied; but, in every case, must be expressed, and so clearly expressed as to be incapable of being misunderstood, or they are not binding on the carrier." Under such a view of the law the court, which had previously held that an undertaking to "take" goods "through to their destination" was not an "express" contract to do so, nor was matter from which such a contract could be implied, could not be expected to hold that the giving a receipt for goods "bound for Stafford," for the freight or carriage of which they charged a full, entire freight, was a contract to carry them to Stafford, as there only could be such a contract where it was *expressly* made, and if undertaking to "take" them to Stafford did not make it a contract to "take" them there, receiving them

[1] See pp. 177, 178. [2] Page 177.

and charging and receiving one entire payment for the freight for the whole route, when the goods were only "bound for Stafford," clearly could not make such an express contract, — an *implied* contract being entirely out of the question!

We think, all things considered, the cases in Connecticut on the question are not of much weight. As being the outcome of a decision originally of but the barest majority of the court, three judges, — the two leading judges, Waite, C. J., and Hinman, J., subsequently C. J., very emphatically dissenting from the decision, — and the cases themselves, on one of the two leading grounds on which they were decided, being elsewhere universally condemned; and, on the other, fairly abounding in contradictions and the crudest of absurdities, and being opposed by the solid body of English law, and, so far as we have yet examined the cases, by the great body of law in this country as well; we should expect to find that there are no other decisions in this country which harmonize any more with them on one point than they do with them on the other. And on this other, it is, in effect, alleged, as we have already quoted[1] from the case in the State of Maine, that there seems not to be another State in the Union which has adopted their view of the law.

The cases in Vermont, which are cited in the Connecticut cases and elsewhere as being opposed to the English decisions, and in which we shall reasonably look for some such statements of the law as we find in Judge Redfield's works on Carriers and Railways, we next take up for consideration.

The first of these cases is Farmers' & Mechanics' Bank *v.* Champlain Trans. Co.,[2] which does not touch the question. The question here was, when the goods had reached the terminus of the route, as to what was a sufficient delivery, and it was held that to determine that an established usage was important. The subsequent case between the same parties[3] is to the same effect. The case came up the third time, and is reported in 23 Vermont, 186, when the previous decisions were, in effect, sustained. One of the head-notes of the case is as follows: "When a common carrier, by steamboat or other vessel, in the due and common course of his business, delivers his goods or parcels into the custody of the wharfinger upon the wharf, the transit is ended, and his responsibility as carrier ceases, unless he have, either expressly or by fair implication, undertaken to do something more; and the question as to the time and place when the duty of the carrier ends is one of contract, to be determined by the jury from

[1] See *supra*, p. 141, n. 1.
[2] 16 Vt. 52.
[3] 18 Vt. 131.

a consideration of all that was said by either party at the time of the delivery and acceptance of the parcels by the carrier, the course of the business, the practice of the carrier, and all other attending circumstances, the same as any other contract, in order to determine the intention of the parties." This is the simplest of elementary law, is in perfect accord with the actual holding in the New York, Massachusetts, Maine, and English cases which we have examined on this subject, and with the views of Chief Justices Waite and Hinman, and is in flat antagonism to the holding of the mere majority of the judges in the Connecticut cases, and to their reasoning which culminated in those badly-decided, absolutely nonsensical cases.

We find in this case, quite as we expected from the evident misunderstanding of Judge Redfield in his works on Carriers and Railways, referred to by us,[1] that the Vermont cases are tinctured with his inaccurate views on the subject. We are not surprised to find him saying in this case: "There has been an attempt to push one department of the law of carriers into an absurd extreme, as it seems to us, by a misapplication of this rule of the carrier being bound to make a personal delivery,— that is, by holding the first carrier upon a route consisting of a succession of carriers liable for the safe delivery of all articles at their ultimate destination." Muschamp *v.* Lancaster Ry. Co.[2] was evidently the leading case Judge Redfield then had in view. But that case did not rest at all on an application or "misapplication of this rule of the carrier being bound to make a personal delivery," but rather on the fact that there was matter in that case from which, *primâ facie*, the jury might imply a "particular contract." The law in that case is in principle identical with the law as we have quoted it from the head-note of the Vermont case, namely, that a carrier may, "*either expressly or by fair implication*, undertake to do something more" than merely carry goods over his own part of an entire route; "and," as previously quoted from the head-note of the Vermont case, "the question as to the time and place when the duty of the carrier ends *is one of contract, to be determined by the jury from a consideration of all that was said by either party at the time of the delivery and acceptance of the parcels by the carrier*," *etc.*, "*the same as any other contract, in order to determine the intention of the parties.*"

Indeed, we find Judge Redfield himself admitting this, where he says:[3] "Muschamp *v.* The L. & P. Ry. Co.[4] is the only English case much relied upon in favor of any such proposition, *and*

[1] *Supra*, p. 96 *et seq.*
[2] 8 M. & W. 421.
[3] At p. 209.
[4] 8 M. & W. 421.

that case is, by the court, put upon the ground of the particular contract in the case." And the "special" or "particular contract" in that case was one that arose simply by "fair implication" *from all the "attending circumstances, the same as any other contract;"* which, where it is so to be implied, is quite as binding as an express contract. And, until we met with the fallacious Connecticut cases, we had not expected, on fairly examining the cases in this country (as we have done those of Massachusetts, Maine, and New York, as well as of Connecticut), to find a single case decided here that would prove really to be counter to the doctrine of the clear, simple, unquestionably correct decisions in the English cases on the general subject.

So again, we find Judge Redfield, in effect, approving the English decisions, where, in distinguishing Weed *v.* Saratoga, &c. R. R. Co.,[1] he says: "That case is readily reconciled with the general rule upon this subject, that each carrier is only bound to the end of his own route, and for a delivery to the next carrier, by the consideration that in this case *there was a kind of partnership connection between the first company and the other companies, constituting the entire route, and also that the first carriers took pay and gave a ticket through,* which is much relied upon by the court;" actually adding: "And in such cases, where the first company gives a ticket and takes pay through, *it may be fairly considered equivalent to an undertaking to be responsible throughout the entire route.*" That is, the circumstances may be such as will warrant the court and jury in implying a contract to carry over the whole route, which will as much bind the carrier to do so as though he had expressly contracted to that effect.

This thoroughly harmonizes with the English cases, and with all the American cases we have examined, save only those, as we think them, utterly untenable decisions by the bare majority of the Connecticut court, which met with the emphatic disapproval of the two able, successive Chief Justices of that court itself. And yet we find Judge Redfield, after using the language we have quoted from his judgment, actually going on to say, as in his treatises: "The rule laid down in Garside *v.* Tr. & M. Nav. Co.,[2] that each carrier, in the absence of special contract, is only liable for the extent of his own route, and the safe storage and delivery to the next carrier, is undoubtedly the better, the more just and rational, and the more generally recognized rule upon the subject."

Such language, whether in his judgment or treatises, is altogether inexcusable. As we have seen in our previous analysis of Garside *v.* The Trent Nav. Co.,[3] no such rule, either *expressly* or

[1] 19 Wend. 534.
[2] 4 T. R. 581.
[3] *Ibid.*

which by the remotest implication could be *implied*, is laid down in that case; nor is it otherwise than in full harmony with the later English cases. The case was an express contract to carry goods to Manchester only, and there deliver them to another carrier, to be taken by that other carrier to Stockport; and as, under the express terms of the contract, the obligation of the defendants as carriers ended in Manchester, it was held that, their carriage of the goods as *per* their express contract being there ended, they were not liable as carriers for the accidental destruction of the goods by fire, after they had been warehoused in Manchester, as the defendants were then merely warehousemen, and no longer carriers.

The actual holding of the Vermont case does not, any more than that in the New York, Massachusetts, or Maine cases, at all affect in any way the sound general principles of construction of contracts, as applicable to carriers, as laid down in the entire unbroken range of English cases on the question, from Upston v. Clark [1] down to the latest English case on the subject.

Judge Redfield says, in the Vermont case we are considering:[2] "The defendants, unless they have, *either expressly or by fair implication*, undertaken, on their part, *to do something more than deliver the parcel to the wharfinger*, are no more liable for its loss than they would have been had it been lost upon ever so extensive a route of successive carriers, had it been intended to reach some remote destination in that mode. *But if the plaintiffs can satisfy the jury, that from the circumstances attending the delivery, or the course of the business*, they were fairly justified in expecting the defendants to make a personal delivery at the bank, they must recover; otherwise it seems to us the case is with the defendants." That is, if the contract was only to "deliver the parcel to the wharfinger," as, in effect, it was in Garside *v.* The Trent Nav. Co.,[3] then, on such delivery, the contract is performed. But if, "*either expressly or by fair implication*," the parties "undertake" "to do something more" than this, as in Muschamp *v.* Lancaster Ry. Co.,[4] and the cases following it, then that express or implied contract must be performed; and "if the plaintiffs can satisfy the jury that *from the circumstances attending the delivery, or the course of the business*, they were fairly justified in expecting the defendants to make a personal delivery" of the goods at their ultimate destination, "they must recover; otherwise . . . the case is with the defendants." [5]

[1] 2 C. & P. 596.
[2] At p. 212.
[3] 4 T. R. 581.
[4] 8 M. & W. 421.

[5] It is also worthy of note in this case (see p. 214) that Judge Redfield lays the same stress on one through payment of freight as is done in the English cases of

All this, from Judge Redfield himself, is a clear and accurate exposition of what is, unquestionably, the only possible honest, intelligent deduction from the whole uniform, unbroken series of English decisions in the matter; and we have, so far, found nothing to convince us that the courts of any State in the Union, except of Connecticut, have decided otherwise; and the alleged "American rule" to the contrary so far as we have yet examined the cases, seems to have no further existence than is justified by the radically unsound, absurdly contradictory decisions of bare majorities of the court in Connecticut. We shall indeed be surprised if the decisions of the courts of any other State have to be added to these. We shall see.[1]

The next Vermont case is Britnall *v.* The Saratoga, &c. R. R. Co.[2] Here the defendants, who were carriers to Castleton, received goods for Boston, but under a receipt which meant merely their carriage to Castleton, for freight to that place; thence to be forwarded to Boston. The court so held as the fair implication from the language in the receipt. The main question in the case was as to the burden of proof simply; the judge, in an action for the loss of the goods, having directed the jury that, the goods having been proved to have been delivered to the defendants, and not received at their ultimate terminus, the burden of proof was on the defendants to show that they had performed their part of the contract by delivering the goods to the connecting road at Castleton. We apprehend that the correctness of this decision will scarcely be anywhere questioned. The same question was decided in Day *v.* Ridley,[3] where goods were delivered to the defendants for carriage from Burlington to Troy, and the defendants claimed that the burden of proof was on the plaintiffs to show

Hyde *v.* The Trent Nav. Co., 5 T. R. 389, and in Muschamp *v.* Lancaster Ry., 8 M. & W. 421, as an assistant in the construction of the carrier's contract. He treated that as making "more strongly in favor of the plaintiffs than anything else in the case," in raising an implied contract to carry the package to its ultimate destination.

[1] In Noyes *v.* The Rutland, &c. R. R. Co., 27 Vt. 110, Redfield, C. J., delivering the judgment, it is said, "It seems to be now well settled, that railroad companies, as common carriers, may make valid contracts to carry beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglects of other carriers, in no sense under their control." This is in opposition to the Connecticut cases; and, to sustain this proposition, the learned chief justice cites three quite important cases, the soundness of the decisions in all which we fully recognise, viz., Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421; Weed *v.* Saratoga, &c. R. R. Co., 19 Wend. 534, and Farmers, &c. Bank *v.* Champ. Trans. Co., 23 Vt. 186. He adds: "*It has never been questioned* that carriers, whether natural or artificial persons, might *by usage or contract* [and "contract" involves express or implied] bind themselves to deliver parcels and merchandise beyond the strict limits of their own line in town and country; and in such case could only exonerate themselves by a personal delivery." This, as we have shown, is exactly the law as uniformly held in England.

[2] 32 Vt. 665.

[3] 16 Vt. 48.

that the goods were not delivered at Troy; but the court very properly held that this was not one of the cases where the plaintiffs were required to prove a negative.

The case of Morse *v.* Brainerd[1] is an important case on the subject, because, while on the one hand stating inaccurately the law in England, the case itself, like so many of the other cases we have found in this country which are assumed to be decisions opposed to those in England, is in strict harmony with the English decisions. The court, in this case, held — again right in the teeth of the Connecticut decisions, on both grounds on which those cases were decided — that the defendants were liable for injury to cattle happening beyond their own immediate route, under an implied contract to carry them safely to their ultimate destination.[2]

[1] 41 Vt. 550.

[2] Pierpont, C. J., in delivering the unanimous judgment of the court, says (at p. 553): "The principle is now well settled in this State that railroad companies, as common carriers, may make valid contracts to carry and transport property beyond the limits of their own roads; and when they do, they are bound to deliver the property at its place of destination, according to their contract, and are liable for all injury to such property prior to its delivery, although such injury happens after the property has passed over their road on its way, and while in the charge of other carriers over whom they have no control. *This contract may be either express or implied.*" This, which is stated to be the settled law in Vermont (one of the States which like New York, Massachusetts, and Maine have been included with Connecticut, as holding, on the question, what they call "The American rule"), is, as will be seen by the exhaustive analysis we have made of the English cases, *supra*, pp. 75–96, a strictly accurate statement of the law as it has been uniformly held in England. And although Pierpont, C. J., thus so clearly states the law as it is held in England, for which he might have cited Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421, and the other English authorities, and which he says is, also, the "well-settled" law of Vermont; like Redfield, C. J., he goes further and says: "In England the rule is, that when a railroad company, as common carriers, receive property destined and directed to a point beyond the termination of their own road, they are bound to deliver it at its place of destination, without a stipulation to that effect. The law imposes that obligation, upon the receipt of the property, and if the company would avoid such obligation, they must do it by a stipulation limiting their liability to injuries happening upon their own road." Here the mistake is made of treating such evidence as was received in Muschamp *v.* Lancaster Ry., 8 M. & W. 421, as conclusive; whereas it was only referred to in that case as *primâ facie* evidence; as evidence from which it would be competent for a jury to infer a contract to carry goods, which a railroad had received, "destined and directed to a point beyond the termination of their own road," to that designated point. But, as Lord Abinger, in that case, put it, this is not "conclusive evidence of the contract." It is merely some evidence of that fact, which may be strengthened, as it was in Muschamp *v.* Lancaster Ry., 8 M. & W. 421, by the surrounding facts and circumstances; or weakened, as in Upston *v.* Clark, 2 C. & P. 598; Gilbert *v.* Dale, 5 A. & E. 543; Syms *v.* Chaplin, *Ib.* 634; Scothorn *v.* South Staffordshire Ry. Co. (as regards the ultimate destination, Australia), 8 Ex. 341; and in several of the cases in this country which we have examined. See this point ably considered by Chief Justice Waite, in his dissenting judgment in Elmore *v.* The Naugatuck R. R. Co., 23 Conn., 457; set out by us in full, *supra*, p. 143, which is a very emphatic answer to the incorrect statement of the English law by the Vermont court. But, Pierpont, C. J., adds: "But in this country the rule established in most of the States is, that the company is liable for injuries that occur beyond the termination of their own road, only *when they stipulate to deliver the property at a point beyond*, and that is the extent to which the decisions in this State have, as yet, gone, and is as far as we are now disposed to go." And, as this "stipulation" may be, as they admit, as we have quoted from their judgment, and as they repeat,

In Hadd *v.* Express Company[1] though the law is erroneously stated as in the preceding case, as though the law were different

"express or implied," that which we have clearly shown to be the law of England is here admitted to be "the rule established in most of the States," or, the so-called "American rule." Hence, the Supreme Court of Vermont explain how it is, that, as we have so far shown is the case, there is — outside of the Connecticut cases, which are decidedly *sui generis*, under what should be known as "The Connecticut *Rules*" and not "The American Rule" — such an absolute uniformity in the principle of the cases on the subject decided in England and in this country; including New York, Massachusetts, Maine, and now Vermont. No case, better than the Vermont case we are now examining, of Morse *v.* Brainerd, 41 Vt. 551, shows the entire, absolute soundness of the decision in Muschamp *v.* Lancaster Rv., 8 M. & W. 421, and the succeeding English decisions on the subject. As the law on the subject is so important, and is supposed to be in such utterly irreconcilable confusion, we spare no labor or space in order to show, as best we can, how extremely plain and simple it is. The fact that, on the *principle* involved, there should be, in the many cases decided in England, such entire uniformity as there is; and that on that *principle*, the courts, in every case, have been unanimous in their judgments; and, that, in England, the correctness of such principle has never been even questioned by counsel or text-writers, shows, at least, an entire absence there of any doubt as to the soundness of their decisions on the question. In Morse *v.* Brainerd, 41 Vt. 550, the defendants claimed, citing the Connecticut and some of the New York, Massachusetts, and Vermont cases which we have examined, that they were not liable for any injury to the cattle that happened after they passed off from the roads of which they had the charge and management, on to the connecting roads, and on their way to their ultimate destination. The court, after stating the law as we have quoted it from their judgment, proceed, in the strictest harmony with the English decisions, and in very emphatic opposition to the "Connecticut rules," thus to argue:—

"If, then, the defendants are to be made liable in this case, it must be upon the ground that they received the property in question under a contract, *express or implied, to deliver it at Medford, its place of destination. Whether there was such a contract or not is mainly a question of fact, to be determined upon the master's report and the evidence referred.* ["How thoroughly English!"] That there was no express contract for the delivery of this property at Medford is conceded. Was there an implied contract to that effect? From the master's report and the testimony of B., one of the defendants, which is referred to as a part of said report, it appears that there was a business arrangement entered into between the several roads that constitute a line of communication by railroad from Ogdensburgh, in the State of New York, to Boston, Mass., for the transmission of passengers and freight; that in this chain the Vermont & Canada and the Vermont Central railroads constitute links; that under this arrangement when a car-load of property was sent from one point upon the line to another it went to its destination without a change of cars; the amount to be paid for carrying the property through the whole distance was agreed upon and fixed at the place of departure by the parties receiving it; this sum might be paid in gross by the consignor in advance, or by the consignee on its arrival; the freight was not to be paid to the several roads over which the property passed in its transit, but the amount which each was to receive was adjusted between themselves in their monthly settlements. This property was billed through from the place where received to the place to which it was sent; and the way-bill in this case is quite significant of what the practice was, and how the parties understood the transaction. It was as follows: 'Merchandise transported by the trustees first mortgage bonds, Vermont Central Railroad Company, *from Swanton*, Vt., to Medford, Mass., November 14, 1859.' Then is entered the number of the car and name of the owner, name of the consignee, description of the property, weight, rate *per* hundred, and the whole amount of the freight, '*payable at the station sent to.*' [These italics are by the court.] When a party sends a car-load of live stock over the roads he is entitled to a free pass over all the intermediate roads on the train with the car to its place of destination. Such a pass was given to Morse. These facts, and, in short, without stopping to enumerate further, the great mass of facts and testimony reported by the master, are consistent, and many of them only consistent, with the idea of an assumed liability to transport the property, in this case, from Swanton to Medford. Such,

[1] 52 Vt. 335.

in England from what it is in this country, the case itself is decided in strict conformity with the holding in the English cases. In this case, the defendants' agent expressly told the plaintiff, who wished to send a package by express, from East Berkshire to Jericho, Vermont, "that the charges would be thirty-five cents to Essex Junction, and that he could not bill beyond that place *as the defendants' route did not extend beyond it.*" The plaintiff said he wanted "to pay through." The agent, Paul, replied that he thought it would cost twenty-five cents by stage, but that if it should be more the plaintiff must pay it. No contract to carry the parcel through the whole route as carriers could possibly be implied from such facts, any more than from the facts in such cases as Upston *v.* Clark,[1] Gilbert *v.* Dale,[2] Syms *v.* Chaplin,[3] Garside *v.* The Trent Nav. Co.,[4] or, as regards the original contract, in Scothorn *v.* South Staffordshire Ry. Co.,[5] to carry the goods to Australia. The court in the Vermont case said, just as an English court, on the same facts, would have said: "In the light of this evidence, it seems plain to us that the only undertaking assumed by the defendants, or that the plaintiff had a right to understand was assumed, was to transport and deliver the package to the stage-line at Essex Junction. Paul told the plaintiff he could only bill it to that place, because the defendant's route only extended to that place. What was said and done about paying for the transportation beyond there, fairly indicated that the defendants were to assume nothing beyond that point."[6] The case was distinguished from the equally well-decided case of Morse *v.* Brainerd,[7] and it is likewise distinguishable from the well-decided

we think, must have been the understanding and expectation of Morse and the station agent at Swanton at the time the property was put on to the defendants' road at that place. It was according to the regular and established course of their business, and such an agreement would have been within the legitimate scope of the authority of the station agent. We think *the fair and just implication from the whole case*, as we have it before us, is that the defendants, when they received the property of Morse, took upon themselves the obligation to transport the property safely from Swanton to Medford, and, such being the case, they are liable to Morse for the injury the property sustained on its way, as reported by the master."

In what perfect accord is all this with the English decisions, and how utterly opposed to the Connecticut cases, where the much stronger evidence of the issue of tickets and *receiving pay* for the entire route, advertising that the goods would be *taken through to their destination*, agreeing to way-bill them through, and other evidence of the same nature, was, after some fluctuation and amid much self-contradiction, in opposition to the English, New York, Massachusetts, Maine, and Vermont cases, held to be not even *primâ facie* evidence of a contract (though previously holding the contrary) beyond their own immediate route; although, as we have seen at one stage of the matter, in Hood *v.* The New York & New Haven R. R. Co., 22 Conn. 502, 508, *et seq.*, they abandon that position, and, in effect, held that there would have been such a contract, but that the company under their charter were incapacitated from making it.

[1] 2 C. & P. 598.
[2] 5 A. & E. 543.
[3] 5 A. & E. 634.
[4] 4 T. R. 581.
[5] 8 Ex. 341.
[6] Hadd *v.* Express Co., 52 Vt. at p. 342.
[7] 41 Vt. 550.

English cases on the subject, such as Hyde *v.* The Trent Nav. Co.,[1] Muschamp *v.* Lancaster Ry. Co.,[2] Watson *v.* The Ambergate Ry. Co.,[3] Scothorn *v.* South Staffordshire Ry. Co.,[4] Crouch *v.* London & N. W. Ry. Co.,[5] Wilby *v.* The West Cornwall Co.,[6] and the other sound English cases on the subject, which are similarly decided.

On the whole, we think the Vermont cases, even more than the New York, Massachusetts, and Maine cases, show, at once, the singular and wide misunderstanding that exists in this country as to the *ratio decidendi* of the English cases on the question, and the unquestionable general soundness of the law as laid down in these latter cases by some of the ablest of the English judges.

As the decisions of the courts which we have so fully examined are those which are mainly relied on as those which are not in accord with the English cases,[7] we shall group together the remaining cases from the State and Federal courts, which are usually cited as establishing a position not in accord with the English cases.

Jameson *v.* The Camden & Amboy R. R. Co.[8] is a case in the District Court of Philadelphia, than which nothing can be clearer. The receipt was expressly ' to deliver [the goods] *at our office in New York, upon payment of freight therefor*, at the rate of 26¼ cents per 100 lbs." It was shown in the margin of the receipt that the goods were marked for Camden, Ohio, and it was there added, "To be shipped for Camden, Ohio, from New York." The court very properly held that this did not show a contract by the defendants to carry the goods to Camden, but merely to carry them to New York for a specifically agreed rate of freight, and then to ship or forward them to Camden. This, in effect, is the same decision as in the English cases of Syms *v.* Chaplin,[9] and Garside *v.* The Trent Nav. Co.,[10] cases which have never been even questioned in England, much less reversed or overruled by any of the subsequent cases, as improperly in this country they have been assumed, by Judge Redfield and others, to have been. The mistake made in this case, as in so many of the American cases, which, like this, are decided identically as the English cases are, and are unquestionably well decided, is in placing undue stress upon the language of Rolfe, B., in Muschamp *v.* Lancaster Ry.,[11] as though, when he stated, in effect, that

[1] 5 T. R. 389.
[2] 8 M. & W. 421.
[3] 15 Jur. 448.
[4] 8 Ex. 341.
[5] 14 C. B. 255.
[6] 2 H. & N. 703.
[7] See 4 Am. Law Reg. 240.
[8] 4 Am. Law Reg. 234.
[9] 5 A. & E. 634.
[10] 4 T. R. 581.
[11] 8 M. & W. 421.

when a railroad receives goods for carriage, addressed to a particular place, as it is thereby implied, that, as the sender, *primâ facie*, delivers them to be carried there, so it is likewise implied that the receivers receive them *primâ facie* to take them there; and that this, in the absence of any positive agreement to the contrary, is evidence from which a jury may infer such a contract; that he, in effect, meant that it was conclusive of such a contract. But, while what he *says* is literally true, it is equally true that, even in the absence of a positive agreement, if there is any other fact connected with the receipt of the goods, such as a one through charge and payment of an entire freight, as there is in so many of both the English and American cases; or, on the other hand, a payment of the freight for a part only of the distance, or any similar fact; the implication, on the one hand, will be strengthened, as in both countries it has been held to be; or, on the other hand, weakened or entirely destroyed, as it has also been held to be, and equally so, too, as our very full and exhaustive analysis of the cases shows, in England as in this country.[1]

[1] This explanation, which seems to us so very clear, and which harmonizes not only the whole body of the English cases with themselves, but the mass of the cases on the subject in this country with the cases in England, has most singularly been lost sight of in hosts of well-decided cases here, where it has been improperly assumed that they were decided and being decided *contra* to the English cases, from those in 5 T. R. 389, and 8 M. & W. 421, down to those of the present time. The case of Mullarky *v.* P. W. & B. R. R. Co., 9 Phila. 114, where there was an express stipulation "to forward the goods only, and there was no payment of freight *or other circumstance from which the jury could infer a contract* to be liable as carriers," as there was in Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421, is in perfect harmony with the English cases. Pennsylvania Central R. R. Co. *v.* Schwarzenberger, 45 Pa. St. 208; Baltimore & Philadelphia Steamboat Co. *v.* Brown, 54 Pa. St. 77; Pennsylvania R. R. Co. *v.* Berry, 68 Pa. St. 272; American Express Co. *v.* Second National Bank, 69 Pa. St. 394; Camden & Amboy R. R. Co. *v.* Forsyth, 61 Pa. 81, which are cited as cases opposed to the English cases, are in the strictest conformity therewith, and only by the greatest distortion can be deemed otherwise. They are all covered by our observations on the Vermont, Maine, Massachusetts, and New York cases, many of which they greatly resemble. While what we have said of those Pennsylvania cases is perfectly true, Clyde *v.* Hubbard, 88 Pa. 358, had it been decided in England, instead of being cited as it is (see note to Wells *v.* Thomas, 72 Am. Dec. 236, 237) as an authority for what is called "The American Rule," would have been considered as one of the most extreme of the late English cases on the subject. The head-note of this case is: "In the *absence of stipulation* by a carrier to transport freight beyond the terminus of its own route, it is not responsible for the default of those it employs to convey the remainder of the distance; *but if it makes itself responsible by contract, or if an agreement to be so can be fairly inferred from the bill of lading* [and, clearly, on the ordinary principles governing the construction of contracts, equally so from any other facts from which such an implication can arise], *it will be liable for a misdelivery of the goods by another carrier, to whom it has delivered them to be carried to their ultimate destination.*" In what perfect accord is this with, not only all the English cases, but with all the American cases we have so far examined on the subject, except only those Connecticut cases, which, with their congeries of blunders, "stand alone, like Adam's recollection of the fall!" In delivering the judgment the court say: "From the heading of the instrument [*i. e.*, the bill of lading or freight receipt, which, in effect, is headed the same as those in some of the English cases] the contract for the carriage of the books appears to have been made in the names of the defendants below, on behalf of the 'Philadelphia & Charleston Steamship

The New Hampshire case of Moses *v.* The Boston R. R.,[1] does not touch the question, except collaterally, and as far as it does so, it expressly follows English decisions.[2]

Line, and Through Freight Line South and Southwest.' *The case containing the goods was marked 'Hubbard Bros., Collinsville, De Kalb County, Ala., via Charleston.' The description of the carriers and the form of address to the consignees would naturally imply a single contract for through transportation and delivery at the point of final destination.*" This is, in effect, exactly what is said by Lord Abinger and Baron Rolfe in Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421. And yet Clyde *v.* Hubbard, 88 Pa. 358, ... one of the cases cited to sustain what is so erroneously called "The American Rule!"

[1] 24 N. H. 71.

[2] There is another New Hampshire case, Gray *v.* Jackson, 51 N. H. 9, which we find cited on both sides of the question; in Book XXI., U. S. 298 (ed. of 1884), it being cited, in a note to Michigan Central R. R. Co. *v.* Mineral Springs Manuf. Co., *Ibid.* 296; s. c. 16 Wall. 190, as sustaining what is called "The American rule;" and, in a note to Wells's *v.* Thomas, 72 Am. Dec. 228, 234, it is cited as following what is known as "The English rule." As New Hampshire is one of the States named (*Ibid.*) as adopting "the rule laid down in Muschamp's Case know in this country as the English rule," we will defer our examination of this case until we have first investigated the other cases decided in this country which are stated to be opposed to the English decisions.

In Grover & Baker Co. *v.* Missouri Pac. Ry. Co., 70 Mo. 672, a rather amusing attempt is made to harmonize the English and American cases on the subject, as follows: "That a railroad may by contract subject itself to the obligation of a common carrier beyond its own line, is well settled by the weight of authority, but as was said in R. R. *v.* Pratt, 22 Wall. 124, the result of American authorities limits the carrier's liability as such to his own line, when no special contract is made. In Perkins *v.* P. S. & P. R. R., 47 Me. 593, it was held that 'a railroad may be bound by special contract, but not otherwise, to transport persons or property beyond the line of its own road.' This remark was criticised in Lock Co. *v.* Railroad, 48 N. H. 455, in which we think it was shown 'that the term *express contract* could hardly have been used in its strict sense, to signify a contract in the form of a direct promise or undertaking, in language, oral or written, proper to show a positive agreement, since the judge who delivered the opinion of the court speaks of a case where the carriers would be liable on the ground that they held themselves out as common carriers to that place; in which case (remarks the judge in the New Hampshire case), as I understand it, the contract would not be express in the strict or usual sense of the term, but implied from the conduct of the party.' Taking the criticism as just, the doctrine may be stated, that a railroad company may be bound by contract, express or implied, but not otherwise, to transport persons or property beyond the line of its own road. As thus declared, it is fully sustained by the authorities, both in the United States and England." We have found it necessary, more than once, to direct attention to the uncertain manner in which the term "special contract" was used in many of the cases. In the New Hampshire case the term is misquoted as "*express* contract," and the misquotation is not singular, as in a kind of misty way it is often used as though "express" were meant; and, indeed, as we have shown, it is so expressly used in the Connecticut cases. But the absurdity of the use of the term in that sense is too palpable. The nearest approach, we think, that can be made to the meaning of the courts using the term, is — taking their entire language and argument — that a railway company can make a contract expressly, or to be implied from the surrounding facts, to carry goods beyond their own immediate route, but the fact that they have received goods for carriage specifically marked for a destination which is beyond their own immediate terminus, must never be taken as one of the facts from which such a contract is to be implied. But why it should not be, not one of them ever gives the slightest intimation. The Missouri court state correctly the foundation of the English decisions, that is, that it is a matter of the construction of the contract, express or implied, in the particular case. While, as we have shown, the whole mass of the cases in this country which we have examined, save only those in Connecticut, have actually been decided on the same principle as the English cases; if the courts, in so deciding, had expressly stated, as they have in fact held, "that a railroad company may be bound by contract, express or implied, to transport persons beyond the line of their own road," there would not have been even the pre-

Baltimore & Ohio R. R. Co. *v.* Schumacher [1] is a case identical with Garside *v.* The Trent Nav. Co.,[2] and decided in precisely the same way. The mistake the court make in this case is in quoting from "Redfield on Railways, 282," the following: "The general view of the American courts is, that in the absence of *special*(!) contract, the rule laid down in the earlier English cases, that the carrier is only liable for the extent of his own route, and for the safe storage and delivery to the next carrier, is the more just and reasonable one." This is wrong in two respects: first, in implying as it does, with the context from Redfield, quoted by us,[3] that the earlier English cases are at all different in principle from the later ones, which they are not; and, second, in asserting, as the extract stands, that "in the absence of special contract," the carrier is liable for "delivery to the next carrier."

In "the absence of special contract," which may be express or implied, it would be hard to say that he would even be liable to deliver to the next carrier; as his liability to do so or not to do so is always governed by the express or implied contract under which he receives the goods.[4]

tence left that they had differed from the holding in the English cases, as regards the law. There would have been left simply the mixed question of law and fact (*a*) as to the nature of the contract which was to be implied from the circumstances in the particular case. Outside of the Connecticut cases we have already shown that in not one of the American cases which we have examined, is the construction different from what, under a similar state of facts, it would have been in England.

Wells *v.* Thomas, 72 Am. Dec. 228; s. c. 27 Mo. 17, is another Missouri case. This case merely shows that where a connecting railway company contracts — of course, expressly or impliedly — with the original receiving company for the transportation of goods over an entire route; another connecting company, being no party to the contract, and having had no notice of it, has the right to collect from the consignee their own freight and regular charges, and if these exceed the price the shipper was to pay for the entire transport of the goods, he has his remedy over against the company with whom he contracted. While this does not militate against the soundness of the English cases, it does go very far towards showing, as a matter of construction of the contract, where goods are received marked for a specific destination, for which an agreed price is paid or to be paid for the entire transportation, that this is one, and but one, entire contract, with the receiving company for the carriage over the entire route; precisely as was the case in the much discussed case of Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421; with, in this latter case, another very strong additional feature, to which we have not yet referred, and to which we have met with no reference in any of the cases, but which we shall point out more specifically at the close of our examination of this class of the cases.

[1] 29 Md. 168.

[2] 4 T. R. 581.

[3] *Supra*, p. 97.

[4] There is really no such thing as a case where a carrier receives goods for transportation, and *undertakes* to transport them, without a special contract express or implied. All that is really correct in the reiterated passage quoted, is, that in the absence of an undertaking to transport the goods, the carrier, *for refusing to transport them*, is liable, at common law, only for refusing to transport them over his own route and delivery at its terminus in the customary way. But this has no

(*a*) It is put in Gray *v.* Jackson, 51 N. H. 9, as entirely a question of fact; but we cannot quite assent to that position. When we come to examine that case more particularly, *infra*, we think we will be able to show that it is rather what is often called "a mixed question of law and fact."

We at length find a case outside of Connecticut, where the facts are virtually the same as those from which it was held in Muschamp *v.* Lancaster Ry.,[1] that it was competent for the jury to infer a contract for the carriage of goods over an entire connecting route; and which is decided *contra* to the last-named case. The case is Phillips *v.* North Carolina R. R. Co.[2] The plaintiff delivered goods to the defendants' agent at Raleigh, N. C., for transportation to Monroe, La., the goods being marked for this latter place. The plaintiff informed the agent that the goods must go to Monroe, and he wanted them put through as soon as possible, as he himself desired to start at once, and would need the goods as soon as he arrived at Monroe. The plaintiff offered to pay the freight in advance, but the agent declined to take it, and told the plaintiff to pay at Monroe when the bale reached that place, which would be in a few days. The goods were safely transferred to Charlotte, the terminus of the defendants' road, where they were delivered to the connecting road, but never reached their destination, having been lost between Charlotte and Monroe. On the trial, the jury, in reply to questions put to them, answered that the defendants made a special contract to transport the goods from Raleigh to Monroe, and that the goods were lost on the route. The court instructed the jury that the defendants had power under their charter to make a special contract to convey to Monroe, and there was evidence to be considered by the jury that the defendants had entered into such special contract. The jury found for the plaintiff. On appeal by the defendants, the court, on the stereotyped language from Redfield on Railways,[3] held that, "In the absence of a special contract the liability does not extend beyond the terminus of the receiving road and the safe delivery to the other road." The decision of the court below, and the finding of the jury were set aside, on the nonsensical ground that the facts proved did not show a "*special* (!) contract."[4]

application to the case where he *does undertake* to transport them, and the question is as to the terms of the express or implied contract which is expressed or involved in such undertaking. This is simply a question of construction of the particular contract, either expressed, or implied by the surrounding facts and circumstances. This is manifest in all the cases, and is self-evident.

[1] 8 M. & W. 421.

[2] 78 N. C. 294.

[3] §§ 162, 163.

[4] Outside of Redfield, the authorities cited were The Nashua Lock Co. *v.* The Worcester & Nashua R. R. Co., 48 N. H. 339; Dixon *v.* The Richmond, &c. R. R. Co., 74 N. C. 538; and Laughlin *v.* The Chicago & N. W. Ry. Co., 28 Wis. 204. The latter two cases do not deal at all with the question as to what constitutes a "special contract;" while, in the New Hampshire case, which we examine more fully in the later division of our comments on this subject, and which, in effect, is the same as the North Carolina case, it is held that essentially the same facts do make out a "special contract." It is also worthy of note that while the English cases hold that facts such as those in the

Lawrence *v.* Winona & St. Peter R. R. Co.,[1] while decided by a court which purported not to agree with the late English decisions, seems to us to go even beyond those decisions. The goods in this case were received "to be forwarded," with an express provision that the defendants assumed no other responsibility for the safety of the goods than might be incurred on their own road. Under such a contract the carriers, in England, would be held liable as such only to their terminus, and as forwarders thereafter. But in the Minnesota case the defendants were held liable for a loss of goods in the defendants' warehouse, after they had reached their terminus, and while they were there awaiting the next carrier. Irish *v.* The Milwaukee & St. Paul Ry. Co.[2] holds that carriers receiving goods marked for a destination beyond their own route, continue liable for them as carriers, where, without delivery or notice, or an attempt to deliver them to the next carrier, they store them in their own warehouse and they are there accidentally destroyed.[3]

North Carolina case would warrant a jury in inferring a contract to carry goods through to their ultimate destination, in the North Carolina case, as far as the question was one of fact for the jury, the jury expressly found that the facts in that case did show such a special contract. It will thus be observed that while of the three cases cited in the North Carolina case two of them do not affect the question involved in it, the third, the New Hampshire case, on the main ground on which the North Carolina case was decided, — that no special contract was shown, — is clearly not in harmony with it. And in a later New Hampshire case, Gray *v.* Jackson, 51 N. H. 9, the decision is expressly opposed to the North Carolina case, on the ground that the question is exclusively one for the jury. And while we cannot assent to that view in all cases, — a point we consider when we state the New Hampshire cases more particularly, — we think, if in any possible state of facts on the subject there could be a question for the jury as to whether the facts in the case constituted a contract, and what that contract was, the facts were such in the North Carolina case. And we think, not only under the uniform holding of the English cases, but in harmony with the large majority of the cases in this country, which are usually, but, as we have shown, erroneously, cited as being opposed to the holding of the English cases, the judge, on the trial of the North Carolina case, instructed the jury correctly on both points; viz., that the defendants had power to make a special contract for the carriage over the entire route, and that there was evidence to be considered by the jury that the defendants had entered into such special contract.

[1] 15 Minn. 390.

[2] 19 Minn. 376.

[3] In all such cases as these, as in Garside *v.* Trent Nav. Co., 4 T. R. 581, as well as on the wider question as to the liability of the receiving company beyond its own route, we think it is simply a question of contract, express or implied. If, as in this latter case, the contract, either express or implied, is simply for the carriage of goods to a specific place, the carrier's liability as such would, of course, terminate when the goods had reached the contract terminus, and the carriers would not be liable as such merely because the goods remained in their warehouse for the accommodation of the shipper or his agent. It is, as in the main question, one as to the construction, whether for court or jury, or both, of the particular contract. Such was the case in McMillan *v.* Michigan, &c. R. R. Co., 16 Mich. 79, where the question arose under a bill of lading. In this case (at p. 119) it is said: "There are a number of English cases in which it has been held, where carriers received goods, and *gave receipt therefor which specified that they were received to be sent to a point beyond their line, and there delivered to the consignee*, that the contract was one for transportation the whole distance, upon which the first carrier might be sued for a loss occurring after the goods had passed out of his hands." For this, Muschamp

The head-note of Detroit & Bay City Ry. Co. *v.* McKenzie,[1] is: "A railroad receiving and receipting goods for transportation to a point beyond the terminus of its road, is not to be understood as undertaking to carry the goods beyond such terminus, unless there is an *express promise* to that effect;" but the case itself is no authority whatever for anything so utterly unsound. What the case holds is that where a railway company contracts to carry goods to its own terminus, and then forward them, as the agents of the shipper, to a point beyond their own route, at a fixed rate of freight for the whole distance, and the shipper or consignee is charged more than this by the connecting company, he has a claim against the first company, under their contract, for the excess which he has been compelled to pay.

In Knight *v.* Prov. & Worc. R. R. Co.,[2] in the bill of lading, there was an express exemption of the carriers from liability beyond their own immediate line. Berg *v.* The Atchison,[3] is to the same effect. The court, in this case, however, say: "It may be conceded that when the contract of shipment is prepared by the carrier and is doubtful or ambiguous in its terms, the doubt or ambiguity is to be resolved in favor of the shipper and against the carrier. This is upon the general rules respecting the interpretation of contracts. Whether the rule of the English courts that carriers who receive goods and book them for a certain destination are, without *any further or special contract* [this, at last, is stated intelligibly], responsible throughout the entire route, is a question which, while for the purposes of this case may be answered in the affirmative, we do not attempt definitely to decide." The Pittsburgh, &c. R. W. Co. *v.* Morton[4] simply holds that, *without a contract*, carriers are not bound to assume the liabilities of such beyond their own route. Notwithstanding the distortion of the English decisions to be found in some of the cases, we know of no case either in England or America where this absolutely undeniable proposition is controverted in terms; although text-writers and courts often clearly imply that there are cases which do controvert it.

The case of Crawford *v.* Southern R. R. Assoc.[5] is one where the contract was that the goods were "to be forwarded," and the

v. Lancaster Ry., 8 M. & W. 421, and Collins *v.* Bristol & Exeter Ry., 11 Ex. 790; 5 H. & N. 969, are cited. This shows an express written contract, and assuming that, in this latter case, the term "sent" was properly construed to mean "carried," then we have the ordinary form of a bill of lading. On such a contract, it would be strange indeed to find any court holding that the carriers were not liable to perform a contract in accordance with their express undertaking.

[1] 43 Mich. 609.
[2] 13 R. I. 572.
[3] 30 Kan. 561.
[4] 61 Ind. 539.
[5] 51 Miss. 222.

court held that this did not make the receivers liable for a loss of goods on a subsequent connecting line, by which the goods were being "forwarded." As the contract here was in writing, the court itself construed the contract, and held that the words "to be forwarded" did not mean "to be carried." Outside of this, the law as stated in the case, as the uniform law in this country, comes so very closely to, as to be virtually identical with, what the law actually is under not only the English decisions, but under the large number of cases in this country which are usually cited as sustaining a position radically opposed to the English cases. The court here adopt the view of the New Hampshire court, in Gray *v.* Jackson,[1] that whether there is a contract between the parties, is a question of fact to be determined from evidence, including the receipt and all the attending circumstances, and consider it error to suppose that what is called the English rule was established as a matter of law; "whereas the leading case in that country proceeded upon the basis, that the question of a contract and liability was one of fact." This comes pretty close to our own view of the case, and tends to show that the statement in the Missouri case, stated *supra*, p. 159, n. 2, which seemed so simple and almost absurd,—that, in effect, the great alleged difference between the English and American cases merely amounts to this, that when, in the latter, the courts use the term "special," as they usually do, or "express," as they sometimes do, they mean not *express*, but "*express or implied*,"—if it do not actually harmonize all the cases, makes the great mass of the American cases, as we have shown in our analysis of them, to be in the most perfect accord with the English cases.

The Mississippi court go on to say: "The authorities *in this country* are uniformly to the effect that *common carriers may contract to carry and deliver goods at a point beyond their own lines, and that in such case the first carrier will be responsible for loss wherever it occurs, — the contract being ascertained and determined, in the absence of an express written agreement, from facts and circumstances.* [This is precisely the English law.] Thus, in Cincinnati, &c. R. R. Co. *v.* Spratt,[2] several parties or connecting lines were associated, for the transportation of freight from Louisville, Ky., to New York, executing through bills of lading, and each charging and collecting through bills of charges. It was correctly held, that each were chargeable as common carriers between the *termini* named, and that in such cases public justice and commercial policy require a stringent construction against any intermediate irresponsibility. But the facts of that case

[1] 51 N. H. 9.

[2] 2 Duv. (Ky.) 4.

clearly distinguish it from the one at bar, wherein there is no through bill of lading; no evidence of association, arrangements, or business connections for through transportation; nor proof of charging or collecting through freight. *These are matters of fact to be established on the trial like any other fact in the case, and from which a through contract may be implied.*[1] *As already intimated, the rule in this country is, that a railroad company is not responsible for the non-delivery of freight beyond its own line, except by contract express or implied.*"

And we quite confidently assert that not a solitary English case can be found on the subject which holds the contrary. And it is from an entirely incorrect assumption that the English cases do hold a doctrine contrary to this, that so many of the American cases, which are assumed to lay down a different doctrine, are found, on examination, to be in perfect accord with the English cases. Thus, the case of Nutting *v.* Conn. River R. R. Co.,[2] cited in the Mississippi case, differed from the English cases in the important fact, that, in the case in 1 Gray, the defendants took pay "for the transportation over their own road only," while, in the English cases, the freight was one entire through rate. The case of Powell *v.* Mills[3] does not touch the question.

We have thus examined in detail the great mass of the State cases which are usually cited as being authorities opposed to the English decisions. We now refer to cases decided in the Federal courts. In the case of Michigan Central R. R. Co. *v.* Mineral Springs Manuf. Co.,[4] the misapprehension as to what the law in England is, is again apparent. It is there said: "It is not necessary in the state of this record to go into the general subject of the duty of carriers in respect to goods in their custody which have arrived at their final destination. Different views have been entertained by different jurists of what the carrier is required to do when the transit is ended, in order to terminate his liability; but there is not this difference of opinion in relation to the rule which is applicable while the property is in process of transportation from the place of its receipt to the place of its destination. In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, although in England, at the present time, and in some of the States of the Union, the disposition is to treat the obligation of

[1] These lines which we have italicized are quite in accordance with the English decisions.

[2] 1 Gray, 502, stated by us, *supra*, p. 106.

[3] 30 Miss. 231.

[4] 16 Wall. 318.

the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction."

The entire inaccuracy of all this must be evident to any one who intelligently examines the English and American cases on the subject. While in many of the cases in this country the effect of the English cases has been greatly misunderstood and misstated, a correct analysis of them all will show that in England, equally as well as in this country, the whole liability of the carrier beyond his own immediate route is one entirely of contract; and in Muschamp *v.* Lancaster Ry.[1] and in all the later English cases, equally with Garside *v.* Trent Nav. Co.,[2] the question involved was simply as to the construction of the contract, express or implied, in the particular case. And in this country, this, likewise, has been the case; and, therefore, notwithstanding the alleged difference in principle between the English and many of the American cases on the subject, we have been able to show, that, with the most insignificant exceptions, the holding in the cases in this country has been in the strictest accord with that in the English cases.

The United States Supreme Court is entirely wrong when, in effect, they say that in England, "in the absence of any special contract, . . . the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route." The "disposition" there is, as we have exhaustively shown, to treat the obligation of the carrier simply as one of contract, and what that contract is, is, on the ordinary principles of common law applicable to contracts, a question of construction whether for the court or jury, or both, on the facts and circumstances of each particular case. Outside of this radical misstatement of the law in the Supreme Court of the United States, which is repeated by the text-writers in this country, and runs through so many of the cases, there is nothing in Michigan Central R. R. Co. *v.* Mineral Springs Manuf. Co.[3] affecting the main question we are considering, as the contract in that case was an express one to carry the goods to the terminus of the receiving company, and thence to forward them by a connecting carrier, and the question involved was whether the liability of the

[1] 8 M. & W. 421.
[2] 4 T. R. 581.
[3] 16 Wall. 318.

railway, after the goods had reached such terminus, and, before they were forwarded, was that of carriers or warehousemen.

In Railroad Co. *v.* Pratt,[1] the court found the law as they had misstated it above, turned against themselves. It was there in their own language broadly stated, thus: "The rule that holds the carrier liable only to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." And again, "No case can be found where the simple acceptance of goods for transportation beyond the terminus of the railroad, under the circumstances stated in this case, has been held as sufficient to render the Railroad Company liable for loss on a connecting railroad, except in those courts which countenance the English rule of a railway's liability. If the evidence in this case is sufficient to authorize a jury to find that there was an implied contract to deliver the horses safely in Boston, the American rule approved by this court is practically overthrown." And yet, under the facts of the case, the United States Supreme Court were compelled to hold contrary to those principles which they had previously incorrectly laid down; and the case, like so many other of the American cases which we have examined, which are usually cited as being opposed to the holding in the English cases, is in the strictest accord, in its holding, with such cases.

The defendants below (plaintiffs in error) were a railway company whose line extended from Ogdensburg to Rouse's Point, connecting there with a series of railways running to Boston. The plaintiff arranged with the defendants for the transportation to Boston of horses, part of which were to be shipped at Potsdam on the defendants' line, and the remainder of them at Rouse's Point, at the commencement of the connecting lines; one through rate to be paid for the carriage to Boston, at the same rate as though they were all shipped at Potsdam. The freight was not paid in advance, but was to be paid in Boston. The way-bill was of merchandise "transported by" the railway "from Potsdam Junction to Boston, *viâ* Concord;" the consignees being described as in Boston. The horses were destroyed by fire on the connecting road. On the trial the court, in accordance with what is so incorrectly held to be the result of the cases generally in this country, directed the jury, that the defendants would not be liable for a loss occurring on any other railway in the line unless, at least, they "*specifically and expressly*" (evidently so under-

[1] 22 Wall. 123. See s. c. Book XXII. U. S. Sup. Ct. R. 827, 828; from both of which reports we quote.

standing that much-abused term "special contract") contracted to transport the horses through or beyond their own road to where the accident happened; that otherwise they would be forwarders, and their liability would be discharged by safely delivering to the next road in the line. Notwithstanding this incorrect and entirely too favorable direction for the defendants, the jury found for the plaintiff. Similar inaccuracy is also observable in the case in the Supreme Court, where they say: "The fair result of the American cases limit the carrier's liability as such, when no special contract is made, to his own line, although there are cases which hold the liability as continuing the same throughout the whole route, and such is the English doctrine. [Nonsense!] A discussion on this point is unnecessary, as the judge on the trial held the rule as we have stated it, and as was most favorable to the defendants."

Clearly, it is not the English doctrine, that, independent of contract, there is such a liability; but, it is the English doctrine, with which the holding of almost every case in this country agrees, *contra* to the above statements, and to numerous others to the same effect, that such contract may be either express, or be implied from the facts and circumstances of the particular case. And, as we have intimated, this case of Railroad Company *v.* Pratt,[1] in its actual holding, is in the strictest accord, on the main question involved, with the English cases.[2]

[1] 22 Wall. 123, 129 *et seq*

[2] This will abundantly appear by the following quotations from the unanimous judgment of the Supreme Court. They say: "The defendants were an incorporation organized under the general railroad law of the State of New York. They possessed the powers given to corporations generally, and were subject to the corresponding liabilities. Assuming the case to stand upon the general principles applicable to the question, the doctrine that a railroad company may subject itself to the obligations of a carrier beyond its own line has been distinctly held in the State of New York, where this contract was made; in the State of Massachusetts, where its performance was to be completed; and in the State of Vermont, where the alleged injury occurred. In the case of Curtis *v.* Buffalo & St. Lawrence R. R., 24 N. Y. 269, it was held that this principle applied to connecting roads extending beyond the limits of the State. The single exception to this holding, so far as we are aware, is in the State of Connecticut, where the contrary has been held by its Supreme Court. . . . Was there evidence in this case that the Ogdensburg, &c. R. R. Co. did contract as a common carrier to transport this property beyond its own terminus over other roads to Boston? The weight, the force, or the degree of the evidence is not before us, *if there was competent evidence on which the jury might lawfully find the existence of the contract alleged.* Dirst *v.* Morris, 14 Wall. 484; Mills *v.* Smith, 8 Wall. 27. *Both the authority of Graves, the station agent, and the evidence of Pratt and others, of the making of the contract, were questions of fact for the consideration of the jury. If the jury have found in the plaintiff's favor on these points, upon evidence legally sufficient to justify it, this court cannot interfere with their findings.* (*a*) The evidence on both these points may properly be considered at the

(*a*) This, we think, is an accurate statement of the law, and is, in effect, strictly the holding of the much-attacked, but, we think, the thoroughly well-decided case of Muschamp *v.* Lancaster Ry., 8 M. & W. 421; but, as we shall show, disagrees with the holding in Gray *v.* Jackson, 51 N. H. 9.

Insurance Co. *v.* Railroad Co.,[1] another of the cases cited as being opposed to the English cases, was decided on an express contract, made with other parties, under the terms of which the defendants were held not liable for a loss with which they had nothing to do. It is no more opposed to the holding in the English cases than is the previous United States Supreme Court case we have examined.

same time. Pratt testified that he had for many years been in the habit of transporting horses over the defendants' road to Boston, to the number of two hundred a year, and that Graves had been the station agent at Potsdam for five or six years; that nearly a week before the present shipment, Graves engaged to give him on that day two good stock-cars to carry his horses to Boston, and that the cars furnished by Graves had always come over these roads and delivered the horses in Boston, and that the arrangements made by him were recognized by the other roads; that Graves's office was in the Potsdam freight-house, and that he paid the freight through, sometimes at Potsdam and sometimes at Boston; that on this occasion he agreed with Graves upon the price through to Boston, viz., $55 a car, and that a way-bill was made out for the horses and cars to Boston at the price mentioned. Other witnesses give testimony in corroboration, which it is not necessary to refer to. Graves testified that he was the station-master at Potsdam, and that the cars were billed from Potsdam to Boston, *via* Concord, as *per* bill; *that the price agreed upon was not paid in advance*, but it might have been. The way-bill was headed thus: 'Way-bill of merchandise transported by Ogdensburg & Lake Champlain R. R. Co. from Potsdam Junction to Boston *via* Concord, March 28, 1868.' It describes the two cars with horses, and as consigned to Pratt & Brigham, at Boston. We see no sound objection to the admission of this way-bill in evidence. If a written contract, it was not only evidence, but the best of evidence, what the contract was. It was exhibited to Pratt before the cars were started, as a part of the transaction. If not a contract, it was an act done and a declaration made by the agent in the very act of transacting the business, and as a part of it, which brought it within the principle of the *res gestæ*. This evidence shows that the oral engagement was 'to carry his horses to Boston;' not to carry to Rouse's Point, and thence to forward to Boston, but 'to carry' as well and as fully over the Vermont and Massachusetts roads as over the Ogdensburg road. Again, *a specific price was agreed upon for transportation over the whole route.* This was in accordance with the practice, *and whether paid at Potsdam or at Boston was unimportant.* This practice had been continued for years, and the jury had the right to hold the contract to be the same, without reference to pre-payment or post-payment. *The jury were justified in inferring that where a carrier fixes a price for transportation over the whole route, that he makes the entire contract his own. One who carries simply over his own line, and thence forwards by other lines, would ordinarily, the jury may say, make or collect his own charges, and leave the remaining charges to be collected by those performing the remaining service. Receipt of the entire pay affords a fair presumption of an entire contract.* The language of the way-bill is quite expressive. It describes 'merchandise transported . . . from Potsdam to Boston.' Transported and carried are equivalent terms, and quite distinct from the idea of forwarding. Whether looked upon as a contract or as a declaration, or an admission simply, the way-bill furnishes evidence that the Ogdensburg company undertook to carry the horses to Boston. In Root *v.* Great Western R. R., 45 N. Y. 524, in speaking of the contract to transport as a common carrier over other lines, the court say: '*Such an undertaking may be established by express contract* OR *by showing that the company held itself out as a carrier for the entire distance*, OR *received freight for the entire distance*, OR *other circumstances indicating an understanding that it was to carry through.*' We think there was *competent evidence before the jury that the company undertook to carry this property to Boston;* and the jury having found such to be the fact, the other companies are to be deemed the agents of the defendants, for whose faults the defendants are responsible." All of this reasoning, especially the portions we have italicized, as well as the actual holding in this case, is virtually the same as in Muschamp *v.* Lancaster Ry. Co., 8 M. & W. 421, and the succeeding English cases; and yet this case, among other Federal Court decisions, is being constantly cited as though it were differently decided.

[1] 104 U. S. 146.

In Myrick *v.* Michigan Central R. R. Co.,[1] the usual error is made of stating — this time a little more specifically than usual — that in England, independent of contract, express or implied, the doctrine is that *at common law* the rule of liability adopted is that a railroad company is liable for goods which it may receive for carriage, not only for loss or injury on its own line, but anywhere on the way to the ultimate destination of the goods, wherever that may be. Such a statement is simply sheer nonsense. Not a solitary English case can be found which is decided on such a principle, or in which such a ridiculous proposition is laid down. In every one of those cases, as we have shown,[2] it is simply a question as to the specific (or "special") contract, expressed or implied, in the particular case. That it is held there that there is any *common-law* doctrine, other than is involved in the principles governing the construction of contracts, making carriers liable for the transportation of goods over another railway connecting with their own, is one of the grossest of fallacies. We doubt very much — although the Supreme Court of the United States say that a similar doctrine to that which they say has been adopted in England prevails in some of the States in this country — if any of the cases in this country will warrant such an assertion.

We shall see directly, when we come to examine the cases in this country which are usually cited as being in accord with the English cases, whether they are really more or less in harmony with the English cases than those are which, though cited the other way, are, in the vast majority of them, in the strictest harmony with the English cases.

The perversion of the English cases is really wonderful. The language in Myrick *v.* Michigan Central R. R. Co.[3] is scarcely less wonderful. The court, after referring to the language in the receipt where cattle are referred to as "marked and described as above," and to a clause by which it was expressly declared "that the company would not be responsible for any loss, damage, or injury to the property after the same shall have been sent from its warehouse or station," *unanimously* say: "Though this rule, brought to the knowledge of the shipper, might not limit the liability impressed by a specific through contract [they evidently mean here *express* contract], *yet it would tend to rebut any inference of such a contract* [that is, a contract to be *implied* from such fact] *from the receipt of goods marked for a place beyond the road of the company.*"

Then here, quite as is held in Muschamp *v.* Lancaster Ry.,[4] they

[1] 107 U. S. 102.
[2] *Supra*, pp. 75–98.
[3] 107 U. S. 102, 108.
[4] 8 M. & W. 421.

admit that there is an "*inference of such a contract from the receipt of goods marked for a place beyond the road of the company;*" but quite right, and quite consistent with the English cases, they claim that the express provision in the contract, excluding the company from liability beyond their own route, will "tend to rebut any inference of such a contract *from the receipt of goods marked for a place beyond the road of the company.*" And yet, though making this frank and thoroughly correct admission, they find fault with the Supreme Court of Illinois for holding the very doctrine, the correctness of which they themselves have only just admitted. Thus, in the very next page of the case, they say: "Our attention has been called to some decisions of the Supreme Court of Illinois, which would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line, is *primâ facie* bound to carry them to that place and deliver them there; and that an agreement to that effect is implied by the reception of goods thus marked.[1] Assuming that such is the purport of the decisions, they are not binding on us. What constitutes a contract of carriage is not a question of local law, upon which the decision of a State court must control. It is a matter of general law, upon which this court will exercise its own judgment.[2] If the doctrine of the Supreme Court of Illinois, as to what constitutes a contract of carriage over connecting lines of roads, is sound, it ought to govern not only in Illinois, but in other States; and yet the tribunal of other States, and a majority of them, hold the reverse of the Illinois court, *and coincide with this court.* Such is the case in Massachusetts.[3] If we are to follow on this subject the ruling of the State courts, we should be obliged to give a different interpretation to the same act — the reception of goods marked for a place beyond the road of the company — in different States, holding it to *imply* one thing in Illinois and another in Massachusetts."

And yet, although they have themselves only just before admitted that "the receipt of goods marked for a place beyond the road of the company" does "imply," or warrant an "inference of such a contract" (which implication, or inference, or *primâ facie* evidence, they themselves, in effect, say that notice that the company was only to be held responsible on its own line "*would tend to rebut*") to carry beyond its own route, they find

[1] Illinois Central R. R. Co. *v.* Frankenburg, 54 Ill. 88; Illinois Central R. R. Co. *v.* Johnson, 34 Ill. 389.

[2] Chicago City *v.* Robbins, 2 Black, 418; Railroad Co. *v.* National Bank, 102 U. S. 14; Hough *v.* Railway Co., 100 U. S. 213.

[3] Nutting *v.* Connecticut River R. R. Co., 1 Gray, 502; Burroughs *v.* N. & W. R. R. Co., 100 Mass. 26.

fault with the Supreme Court of Illinois for holding with themselves that, "*prima facie*," such evidence does import such a contract!

The Massachusetts cases too, as we have shown, do not hold *contra* to the doctrine of the law as stated from the Illinois cases, but in effect hold very much to the same effect, as is admitted by the Supreme Court of the United States themselves, that the presumption, inference, implication, or *primâ facie* case, resulting from receiving goods for shipment marked to an ultimate destination beyond their own immediate route, may be rebutted by such facts as are stated in Railroad Co. *v.* Pratt,[1] or by the receipt of the freight for the goods over their own portion of the route only. Notwithstanding these glaringly contradictory positions, — so noticeable in all this class of cases, — in Myrick *v.* Michigan Central R. R. Co.,[2] the actual holding in it, as in the other cases decided by the United States Supreme Court which we have examined, is perfectly consistent with the English cases, and with the law as quoted from the Supreme Court of Illinois. In the case itself there was an express provision in the contract exempting the carriers from liability beyond their own route, and there was nothing whatever in the case, with all its facts and circumstances, from which a contract could possibly have been inferred for liability by the defendants beyond their own route.

In the case of Stewart *v.* Terre Haute & I. P. Co.,[3] in the United States Circuit Court, the facts are virtually identical with those in Railroad Co. *v.* Pratt;[4] but in the Circuit Court case the judge was evidently carried away with the reiteration of the phrase which has led to so much fallacious reasoning, — "In the absence of a special contract[5] the carrier is liable only to the extent of his own route, and for the safe storage and delivery to the next carrier," — and the holding of the Supreme Court, in Railroad Co. *v.* Pratt[6] was not followed. The attempt made by the Circuit

[1] 22 Wall. 123.
[2] 107 U. S. 102.
[3] 1 McCrary, 312.
[4] 22 Wall. 123.
[5] The term "special contract" is usually and properly used in connection with pleading, as in Witherington *v.* Buckland, Cas. Temp. Hardw. 295, to distinguish the case where the action is in special assumpsit, on the *special* or particular contract, from the case where the action is in *indebitatus* assumpsit. But the term is not at all used in that sense, nor in any other fairly intelligible sense, in those cases where it is employed in connection with the liability of a carrier beyond his own immediate line. The term "special contract" is used in Bishop on Contracts, § 104, incorrectly, as synonymous with a *specialty*, — *i. e.*, a contract by deed. As a matter of pleading, an action on a specialty is in covenant; an action on a "special contract," on the other hand, as the term is used by the common-law writers, is in special assumpsit. Bishop also makes the mistake of speaking of a special contract as the converse of a simple contract, or contract by parol. A specialty — not a special contract — and a simple contract are the two classes of contracts, by deed and by parol.
[6] 22 Wall. 123.

Court judge to distinguish the cases, in one important particular, shows the grossest carelessness on his part. It was not, in this case, a question as to the effect of receiving goods marked for a specific destination, but as to what was the contract between the parties from facts virtually identical with those in Railroad Co. *v.* Pratt.[1] We have already stated the facts in the latter case. Those in the Circuit Court case were as follows: The plaintiff in this case, as in the Supreme Court case, had been in the habit of shipping over defendants' line to points beyond its terminus; and the arrangements made in this case were similar to the previous transaction between the plaintiff and defendants. The defendants' line extended to Indianapolis, where it connected with another railway, part of a through line to Buffalo. The plaintiff informed the agent of the defendants at East St. Louis that *he desired to ship a lot of cattle to Buffalo, and inquired of said agent whether the defendants were shipping and would take the cattle for shipment.* The agent replied that they were shipping at that time, and could take the cattle; and in answer to an inquiry by the plaintiff, informed him that *the through rate to Buffalo was* $70 *per car. The plaintiff thereupon agreed to ship over defendants' road, and did so. The freight was paid at the end of the route, to the last shipper, as was customary in such cases,* and each of the lines over which the shipment passed received its proportion, the defendants receiving payment only for the carriage to Indianapolis. There was no written contract; but a memorandum was made by the defendants' agent showing the number of the cars on which the cattle were shipped, the name of the shipper, the number of cattle, the names of the consignees, and the destination. It seems to us, if there is evidence of any contract whatever in this case, it is evidence of a contract by the defendants to carry the cattle, at one agreed through rate, to Buffalo. Unless there was evidence of such a contract one can certainly see nothing in the facts which expresses a different contract; nor was there a solitary thing expressed from which in any possible way a different contract could be implied. The fact that the different companies divided up the gross sum which the plaintiff agreed with the defendants to pay them for the total carriage of the cattle to Buffalo, could not affect him. He had no contract with the other companies, and if they had a contract among themselves as to the division of the money which he had agreed with the defendants to pay them for the through carriage of the cattle, that could not alter the character of his contract with the defendants. The distinctions which the judge in the Circuit Court case takes as

[1] 22 Wall. 123.

between it and Railroad Co. *v.* Pratt[1] are (1) that in the latter case the court, on a similar state of facts, sustained the finding of the jury which found there was one entire contract for a through carriage of freight; while, in the Circuit Court case, the court itself had the power of the jury to find on the facts. But the Supreme Court held that, as a matter of law, such a contract was well found by the jury, and sustained it on principles of law. While, on the other hand, the Circuit Court held, also on principles of law,[2] that such facts did not make out even a *primâ facie* case of such a contract. In this holding it is entirely opposed by what we think is the much sounder decision of the United States Supreme Court in Railroad Co. *v.* Pratt.[3] The court, in the one case quite as much as in the other, had, contrary to the views of the Circuit Court judge, "to determine not only the competency, but the sufficiency of the evidence;" mere competency of evidence amounting to nothing in either case if not sufficient to establish the fact in controversy.[4] There is clearly nothing in the first point.

(2) The other distinction taken is still worse. After stating some of the facts in Railroad Co. *v.* Pratt,[5] which are essentially the same as those in the Circuit Court case, the Circuit Court judge goes on to say: "It was held that these facts, in connection with the further fact that the plaintiff had been for many years in the habit of transporting horses over defendants' road to Boston, and that a rate for the whole route *was agreed upon and paid*, would justify the jury in finding that there was an engagement to carry the horses through to Boston.[6] It does not appear from the report of that case whether the first carrier was paid the price agreed upon for transportation over the whole route, but *I infer that such was the case* from the remark of the court that the 'receipt of the entire pay affords a fair presumption of an entire contract.'"

This inference was entirely unwarranted, and in both of these facts here named the cases were the same, viz., as to the previous similar transactions of the parties, and as to the payments not being made to the contracting defendants, but at the other terminus.[7] On the whole, then, we think Stewart *v.* Terre Haute &

[1] 22 Wall. 123.

[2] See pp. 315, 316.

[3] 22 Wall. 123.

[4] See *supra*, pp. 168, 169, n.

[5] 22 Wall. 123.

[6] They hold this as a matter of law, as to sufficiency as well as to competency; then, as a matter of law, they could not have held, as was held in the Circuit Court case, that the same facts would have justified the jury in finding the very reverse.

[7] On this latter point, the judge of the Circuit Court is not accurate in his statement — upon which he founds his unwarranted inference — that "it does not appear from the report of that case whether the first carrier was paid the price agreed upon ["agreed upon;" then there *was* an "agreement" or contract. "*Agreed upon*,"

I. P. Co.[1] is not a case of much authority; and, as it is flatly opposed to the holding of the Supreme Court in Railroad Co. *v.* Pratt,[2] that, had it been taken to the Supreme Court of the United States, it would, on the authority of the latter case, have been reversed.

It will thus be seen that almost the uniform actual holding of the cases in this country, which are usually cited as being opposed to the English cases, are in conformity with them; nearly all of them, in effect, holding, as was held in Muschamp *v.* Lancaster Ry.,[3] that where goods are received by carriers marked for a destination beyond the terminus of their own immediate line, and the carriers charge a through rate for the carriage, whether the freight is to be paid at one end of the through route or the other, these are circumstances which raise an inference, or, as convertible terms, are *primâ facie* evidence of one entire through contract. In so holding as they do, they hold in strict conformity with Muschamp *v.* Lancaster Ry.[4] and with the other English cases.

But Muschamp *v.* Lancaster Ry.,[5] has another feature in it which has escaped general observation, to which we will now refer. It appears, then, in this case, by the statement of facts and by the pleadings, that the shipper delivered the goods for transportation as implied by the marks, and as assented to in the conversation that took place on the goods being received for transportation, not only along the lines of railway from Lancaster (the place of shipment), to the terminus of the entire railway route in Derbyshire, but "to be left at the Wheatsheaf, Bartlow, near Bakewell, Derbyshire, a place about eight miles wide" of the last of the connecting railways. The contract then with

between whom? and for what?] *for transportation over the whole route.*" Not only is it expressly stated in the report of Railroad Co. *v.* Pratt, 22 Wall., at p. 132, that *the through freight agreed upon in the one case as in the other* was not paid in advance, but it also appears that the Supreme Court treated as immaterial the fact at which end of the through route the agreed through rate was to be paid; and this, too, in the very paragraph in the case from which the Circuit Court judge quotes. The following extracts from the report of the case (at p. 132) show both of these facts: "Graves testified that he was the station-master at Potsdam, and that the cars were filled from Potsdam to Boston *viâ* Concord, *as per bill; that the price agreed upon was not paid in advance*, but it might have been. . . . Again, a specific price was agreed upon for transportation over the whole route. This was in accordance with the practice, and *whether paid at Potsdam or at Boston was unimportant.* This practice had been continued for years, and the jury had the right to hold the contract to be the same, *without reference to prepayment or postpayment.* The jury were justified in inferring that where a carrier fixes a price for transportation over the whole route, that he makes the entire contract his own. One who carries simply over his own line, and thence forwards by other lines, would ordinarily, the jury may say, make or collect his own charges and leave the remaining charges to be collected by those performing the remaining service. Receipt of the entire pay affords a fair presumption of an entire contract."

[1] 1 McCrary, 312.
[2] 22 Wall. 123.
[3] 8 M. & W. 421.
[4] *Ibid.*
[5] *Ibid.*

whomsoever made, was for the transportation of the goods from Lancaster, one of the *termini*, to the Wheatsheaf, Bartlow, the other of the *termini*, at which latter place the goods were to be received, and the freight for the entire through route (which was the only contract made, expressed or implied) was then and there to be paid. If this does not show an express or implied contract to transport the goods from Lancaster to the Wheatsheaf, then it is next to impossible to conceive what would make such a contract with a railway company to carry goods, even where the entire carriage of the goods is to be on their own immediate line. That there was a contract in the case is assented to by all. That being so, then the only contract was for the carriage, for the one entire consideration for the contract, from the place of shipment to the place of ultimate destination of the goods, as fixed, not only by the marks, but by the other surrounding facts and circumstances, *i. e.*, from Lancaster to the Wheatsheaf, Bartlow. Then, with whom was the contract made? Either with the first company or with no one. Why? Because there was no undertaking with the shipper by any other party than the first company to take the goods to Bartlow at all. Suppose the goods had arrived at the terminus, in Derbyshire, of the last connecting railway, and this railway had refused to incur the risk of carrying the goods further, — as clearly, in this country, they might well do, — no action against them would lie for the non-delivery of the goods at Bartlow, for they had never contracted to carry them there. On the face of the case, no action would lie against any special carter for not taking them from the railway terminus in Derbyshire to Bartlow, for the only contract which was made in the case with the first company would be performed by the goods being sent to Bartlow by any carter, and no special carter was in any, the most indirect, way, a party to the contract at all. The only implication from the terms of the contract would clearly seem to be that for one entire through rate, to be paid by the shipper's consignee on the arrival of the goods at the Wheatsheaf, Bartlow, the first and only contracting company undertook to carry the goods not only over the different lines of railway, but further to Bartlow, eight miles from the railway; when, on their delivery there, having performed the whole of the only contract which was made with reference to the goods, they would have the right to demand and receive the one through rate for the transportation of the goods between the two originally designated *termini*.

We think it, then, clear, that if in this country it is held, as it so generally is, that receiving goods by a railway designated for shipment to another point on a connecting line, for which one

entire sum is paid or to be paid, implies a contract with the receiving company for the whole route; *a fortiori*, it does, when the undertaking to carry, and the one payment to be received therefor, is specifically for a point off the line of railway which may require the employment of a special conveyance to reach.[1] Such a case would be similar to that of sending a telegram for transmission over a number of connecting lines, for delivery at a point remote from the lines, and an entire payment, made or to be made, from the receiving point to the ultimate point, including the charge for a special messenger from the railway to such point. The entire contract here clearly would be with the receiving company, and if they failed to take the necessary steps to transmit the message not only over the telegraph lines, but to the ultimate point of payment and destination, an action would well lie against them for their breach of contract. This, in effect, is *Muschamp v.* Lancaster Ry.,[2] which, as we have shown, though so generally treated in this country as establishing some new and doubtful principle, is, judged by the cases in which it is so treated, as well as by the well-established principles of law applicable to the case, undoubtedly well decided. We will now examine the cases in this country which are considered, with the English cases, to be in antagonism to the State and Federal cases we have examined.

Illinois, as we have already seen, from the reference in Michigan Central R. R. Co. *v.* Myrick,[3] is one of the States in which the law is stated to be held as in England. In Illinois Central R. R. Co. *v.* Copeland,[4] where the railroad company sold tickets and checked baggage from Chicago to St. Louis, the court held that they were liable as common carriers over the whole route, no matter how many intervening railways there may have been; the presumption from the check and ticket being, that they were running in connection with such railways. They say, "It can make no difference, we apprehend, whether the passengers and baggage changed cars or not. The passengers can rely on their tickets and checks, and hold the Illinois Central accountable for loss or damage. We think the evidence is strong enough to imply a special undertaking by the defendant, to carry this passenger and

[1] On this ground Muschamp *v.* Lancaster Ry., 8 M. & W. 421, simply follows Hyde *v.* Trent Nav. Co., 5 T. R. 389 (A. D. 1793), in which latter case the carriers were made liable for a loss of the goods after their own immediate transport of the goods had ended, inasmuch as they had made a charge for cartage from their warehouse to the consignee's premises, and the goods were lost before they were so conveyed by the connecting carter. So that, on this ground, the doctrine in Muschamp *v.* Lancaster Ry., 8 M. & W. 421, is far from novel.

[2] 8 M. & W. 421.

[3] 107 U. S. 102.

[4] 24 Ill. 332.

his baggage through from Chicago to St. Louis, and, *pro hac vice*, the connecting road was the defendants' road." With reference to the holding of the English cases, they say: "We are inclined to yield to the force of the reasoning of the English courts, on principles of public convenience, if no other, and to hold, when a carrier receives goods to carry, marked for a particular place, he is bound to carry to, and deliver at that place. By accepting the goods so marked, he impliedly agrees so to do, and he ought to be answerable for the loss."

It was held in Illinois Central R. R. Co. *v.* Cowles,[1] where the connecting company received goods from the first company, and gave a receipt for them, that they were liable for their loss on their own road. The words "to be forwarded by the Illinois Central R. R. Co.," in a receipt for goods "for J., Wheeling, Virginia," was held, in Illinois Central R. R. Co. *v.* Johnson,[2] to be an express contract for the carriage and delivery of the goods to the designated point. The court said: "As to the liability of the defendant to transport these goods to Wheeling, there can be no doubt. In the case of the Illinois Central R. R. Co. *v.* Copeland,[3] we held, when a carrier receives goods to carry, marked for a particular place, he is bound to carry to and deliver at that place. It is only on an agreement implied from the mark or direction on the goods, and accepting them so marked, that the liability arises.[4] Much more is he bound when he undertakes expressly to carry and deliver."[5]

[1] 32 Ill. 116.
[2] 34 Ill. 389.
[3] 24 Ill. 338.
[4] Ladue *v.* Griffith, 25 N. Y. 364.
[5] The case of Toledo, &c. Ry. Co. *v.* Merriman, 52 Ill. 123, is one of the construction of a written contract, which was of so ambiguous and contradictory a character as to be open to almost any construction. While, on the face of the contract, the railway company purported to exempt themselves from liability after goods shipped by them were delivered to a connecting carrier, they received the goods for transportation to a place beyond their own terminus; issued for them what they themselves designated a "through freight contract," and in their conditions they declared that "the responsibility of this company as a common carrier, under this bill of lading, is to commence on the removal of goods from the depot on the cars of the company, *and to terminate when unloaded from the cars at the place of delivery.*" And it was admitted that the company were at the time engaged in the business of shipping goods to points beyond their own terminus; that in shipping through freight they generally sent it through in the same cars, and did not change it at the terminus of their own line. The defence was that they were not liable for a loss happening beyond the terminus of their road. But the court held, sustaining the verdict of the jury, that they were liable. Breese, C. J., in delivering the unanimous judgment of the court, said: "This defence is utterly groundless, as the receipt, or bill of lading, shows upon its face it was a 'through freight contract,' and it was in proof by the defendants' agent that freight received by this company as through freight was never unloaded or delivered at their terminus, but forwarded on to its place of destination in the cars in which it was received. It is idle, then, for the defendants to claim this was not a through contract, and that their liability did not extend beyond the terminus of their own road. The defendants must perform their contract, or show some valid excuse for non-performance. None is shown in this case. The plaintiff's right to recover the value of his goods cannot be questioned. This the jury have allowed him. We see no reason to disturb their verdict, and the judgment therefore must be affirmed." As intimated, we think the proper construction of the contract is one of considerable

There was an express contract in Illinois Central R. R. Co. *v.* Frankenburg,[1] exempting the company from liability beyond their own line, which was held, three of the judges dissenting, to relieve the company from liability beyond their own line. We see no ground in the case for the dissenting judgments, more particularly as the freight was only paid to the terminus of the defendants' line.

It was sought, in The People *v.* The Chicago & Alton R. R. Co.,[2] to compel a railroad company to receive goods for transportation beyond the terminus of their road, but the court held it had no such power.[3] In Chicago & N. W. Ry. Co. *v.* Montfort,[4] the court say: "The doctrine of this court is, when goods are delivered, marked to a particular place, and beyond the terminus of the line of the railroad company receiving the goods, the receiving company are bound to carry the goods to the place of destination; that, to this extent, is their undertaking at the common law, but that by *express agreement* they may limit their liability to their own route and to its terminus." If we really find a case decided in Illinois in which it is actually held that it is not competent for the carrier to show, by the facts and circumstances of the case, that in a contract to take goods received marked for a destination beyond the terminus of his own immediate line, it could be *implied*, from such facts and circumstances, that he merely contracted to convey them to his terminus as a carrier, and, there as a forwarder, deliver them to another line for further conveyance, then we will find what we think is very bad law. We have already clearly shown that the English cases hold no such doctrine as this, and that numerous cases in this country which have been assumed (to a great extent from the loose expressions many of them contain) to hold a doctrine *contra* to that of the English cases, are in the strictest harmony with them. But there are many of them — well-decided cases, we think — which are not in harmony with what is above stated as being the doctrine of the Supreme Court of Illinois. However, as we have seen in so many cases, the terms "express" contract, "positive" contract," "special" contract, are so often used in a manner not critically correct, and in such a very indefinite, uncertain way, it is just possible that the Illinois court meant no more than to say that where a railroad company received goods for shipment, marked for a destination beyond the terminus of their own immediate line, and in so receiving them there was nothing, expressly or impliedly, to show a

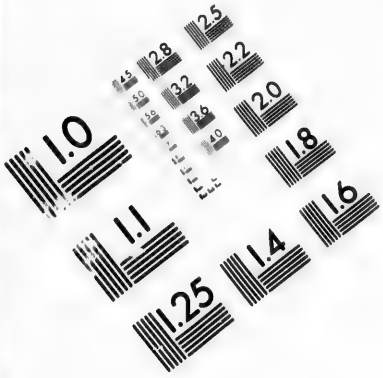
doubt; but we further think that the judgment of the court is sustainable on the doctrine of *contra proferentem*, at least.

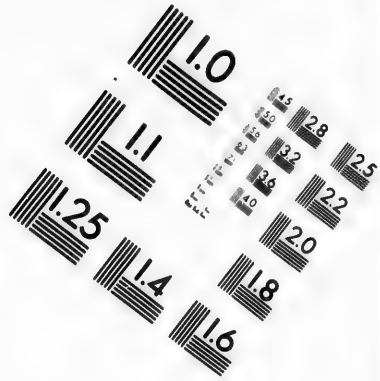
[1] 54 Ill. 88.

[2] 55 Ill. 95.

[3] Chicago & N. W. Ry. Co. *v.* The People, 56 Ill. 365, is to the same effect.

[4] 60 Ill. 175.





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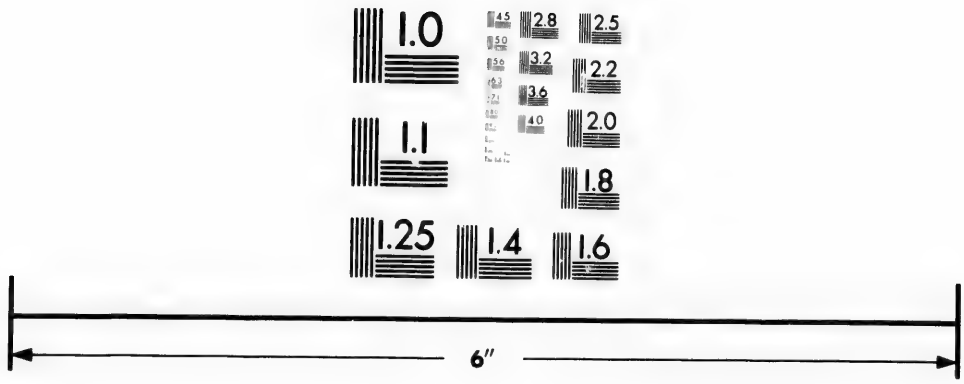

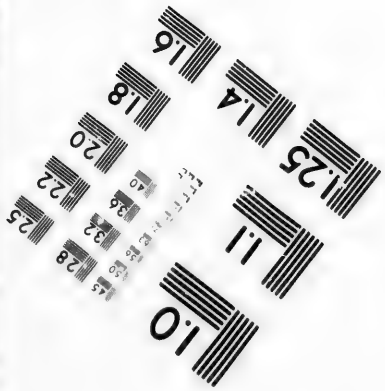

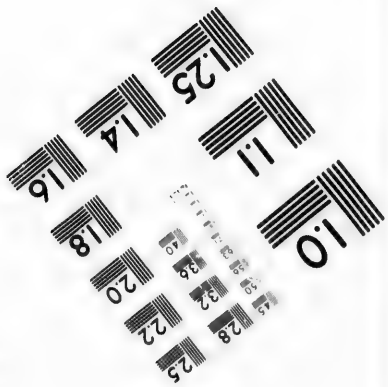

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more limited contract, it would be presumed that the contract with the receiving company was to convey the goods to the marked destination for which they had received them. More than this, we think, is not in accordance with the English cases, nor with the mass of the well-decided American cases.[1]

The actual holding in Chicago & N. W. Ry. Co. *v.* Montfort[2] sustaining the finding of the jury in the matter, is, that the shipper of goods so marked was not affected by a notice not brought to his knowledge, containing restrictions and conditions to which he had not given his assent, and which, it was therefore held, formed no part of the contract under which the goods were shipped. But in United States Express Co. *v.* Haines,[3] where the receipt stated that the carriers undertook to forward a package of money "to the nearest point of destination reached by this company," and then deliver it to another carrier to be forwarded; the plaintiff claimed that he never assented to the limitation of the liability of the company, and that he did not know, when he took the receipt, that it contained any such stipulation. The jury having found for the plaintiff, the court disapproved of the finding.[4]

[1] The expression in the case, too, that such "is their undertaking at common law," we think is not a happy one. As properly admitted in the Illinois cases themselves, the common-law liability of a carrier, independent of contract, is simply for the safe transportation of goods over his own immediate line. His liability, then, to carry goods over a connecting line solely arises from contract, express or implied; and, in the construction of the contract, all the facts and circumstances must be considered. Therefore, while a sender of goods, in shipping them by a railway, marked for a particular destination, thereby implies, in so delivering them, that he expects them to be carried to their designated destination; *primâ facie*, it is implied, when the carrier receives them so marked, and undertakes to carry them, and nothing further appears, that his undertaking to carry them is in respect to the *designated* place to which they are to be carried. And while, on the one hand, this implication may be strengthened by an entire through rate being charged, or by other circumstances which have that tendency, as in Muschamp *v.* Lancaster Ry., 8 M. & W. 421; on the other hand it is open to be weakened or entirely destroyed by proof of payment of carriage for the carrier's own immediate portion of the route only, by usage, or by other facts and circumstances connected with the case, by which, expressly or impliedly, it appears that the contract of the parties was other than for a conveyance of the goods by the receiving carrier over the entire route.

[2] 60 Ill. 175.

[3] 67 Ill. 137.

[4] In doing so they said: "This is one of the questions of fact submitted to the consideration of the jury, but we are not entirely satisfied with their finding. From a careful review of the evidence it seems difficult to reach any other conclusion than that appellee knew of and assented to the limitation contained in the receipt. He was expressly told, before he sent the money, the company's lines extended no farther than Atchison, and at that point it would be delivered to the Overland Stage Co. to be forwarded. This was enough to put him on inquiry as to the character and extent of the undertaking on the part of appellant, and if he did not in fact read the contract, he was certainly guilty of inexcusable neglect in that regard, and especially is this so in view of the fact that he is shown to be a man of large business experience. The neglect to read the receipt could be more readily excused had it appeared he was unaccustomed to such transactions. This is not a case where the company silently received a package marked to a point beyond the termination of its lines. *The facts repel the idea that the company, by its action, induced the consignor to believe it would carry the package beyond the terminal points reached by its own means of*

In Milwaukee & St. Paul Ry. Co. *v.* Smith,[1] the question came up in reference to a contract made and to be performed in the

conveyance. The agent expressly told him the company had no facilities of its own for conveying the package beyond Atchison, and it would there have to be transferred to another carrier. It seems almost impossible, from the evidence in the record, to resist the conclusion appellee knew appellant was contracting only to carry the package to Atchison, and consequently that its liability might be so limited. If so, he is bound by his agreement, and appellant is in no way responsible for the delay that occurred in the transmission of the package to its destination." Independent of this, the damages had been assessed on a wrong basis, and the verdict was set aside. But the court required, in event of another trial, that the jury should be instructed as above. And see Adams Express Co. *v.* Haynes, 42 Ill. 89, where it was held, that if a common carrier gives a receipt for goods, containing provisions limiting *the common-law liability* of the company, and the shipper accepts the receipt, with a full knowledge of its terms, and intending to assent to the restrictions contained in it, it becomes his contract as fully as if he had signed it; but the simple delivery of the receipt to the shipper is not conclusive upon him. Whether he had knowledge of its terms, and assented to its restrictions, is for the jury to determine as a question of fact, upon evidence *aliunde*, and all the circumstances attending the giving the receipt are admissible in evidence, to enable the jury to decide that fact. The same question arose in Field *v.* Chicago & R. I. R. R. Co., 71 Ill. 458, where the court, sitting as a jury, found that the shipper had notice of the limitation of the liability of the company to their own road. The Supreme Court, in sustaining this finding, said: "We are asked to reverse the judgment on the facts alone, and to say the court, sitting as a jury, found against the facts, — gave judgment against the evidence. This court has often held, where a trial is had by the court, as to the facts, the court stands in the place of the jury, and the decision will be reversed or affirmed by the same rules which govern when the facts are tried by a jury. Ambs *v.* Honore, 24 Ill. 122; Eastman *v.* Brown, 32 Ill. 53. And it was emphatically said in Wood *v.* Price, 46 Ill. 435, that the same force and effect should be given to the finding of a judge as to the verdict of a jury. The question, then, made in this case, of the knowledge of the shipper as to the contents of these bills of lading, has been found against the plaintiff, — that he had no such knowledge; and looking into the transaction of the parties, and the proof that these bills of lading were in possession of the plaintiff, and filled out by his clerk, it was impossible, in the very nature of things, their contents should not have been known and well understood by the plaintiff; and it is in proof that the clauses here complained of were understood by the shippers generally; and it is inconceivable that a party shipping eight hundred barrels of flour, in different lots, should not have knowledge of them. It is past reasonable belief. Were a jury sitting in the case, and this testimony before them, and the surrounding circumstances, they might have refused to give credence to the statements of plaintiff and his clerk [that they had no knowledge of the stipulations], and we could not have interfered, for there were facts existing which the jury were bound to take into consideration, sufficient to outweigh such statements. The court, sitting as a jury, has considered all these, and we cannot say the finding is against the evidence." Again: "The doctrine of this court is, as found in the numerous cases decided, that when railroad companies, as common carriers, receive goods marked for a particular place, they are bound, *by the common law*, to deliver at that place; but they may restrict their liability by a contract, fairly and understandingly made, and when so made, if in the form of a bill of lading or otherwise, and the terms understood and accepted by the shipper, it becomes the contract of the parties, and that is this case. *By the common law*, and the decisions of this court in conformity therewith, the railroad company, defendant, were bound to deliver this flour in New York, to John Beck & Co., to whom it was consigned, by the contract with the shipper, appearing in the form of a bill of lading. The terms and conditions were known to the shipper, and accepted by him. Their liability was restricted to their own line, and for this they were competent to contract. The court has found the terms and conditions of these bills of lading were understood and accepted by the shipper. This being so, in the language of the court in Adams Express Co. *v.* Haynes, 42 Ill. 89, it became the contract of the plaintiff the same as if he had signed it. This fact has been submitted to the court, sitting as a jury, and decided,

[1] 74 Ill. 197.

State of Wisconsin. The question as it arose in Muschamp *v.* Lancaster Ry.,[1] and in the other English cases on the subject, seemed never to have been adjudicated upon in that State. The facts as they are stated in the case were, that the appellants were a railway company; their line extending from Milwaukee to La Crosse. It was the ordinary course and general business usage of appellants to receive goods at Milwaukee from consignors, to be carried on their railway, marked and directed to places beyond La Crosse, and off their line of railway, and to carry the goods to La Crosse, and there, *as forwarders*, to deliver to other carriers (steamboat owners, which involved the unloading and delivery of the goods from the railway cars), for forwarding to or towards the places to which the goods were directed. It also appears from the statements in Conkey *v.* Milwaukee & St. Paul Ry. Co.[2] on which case the Illinois court relied, that it was a part of this generally-known usage, on the railroad delivering, as forwarders, to the next company, to collect from the latter their own charges for the carriage from Milwaukee to La Crosse. Three lawyers from Wisconsin swore, that, under the common law, the appellants would not be liable as carriers after delivery of the goods to the connecting steamer.

We are quite of the opinion with the Supreme Court of the United States,[3] on the question as to the construction of a contract on principles of common law, that the courts of any one State administering that system of law are quite as competent to judge as to the proper common-law construction of the contract as those of another; and are not concluded (the *lex fori* and the *lex loci contractus* being the same) by a mistake in the construction of the contract, by the court in the place of the contract. The court in the place of the contract may rectify its own mistakes, or reverse its own wrongly-decided judgments. *A fortiori*, a court in an independent jurisdiction is not concluded by cases which it may hold are wrongly decided. As we have been intimated, we think that where the *lex loci contractus* is to govern, the application is as to the statutes that are there in force, or the particular system of

and we cannot say the finding is wrong." If, in these different references to the "common law," the "common-law liability," &c., anything more is implied, as it seems to be, than as to what presumptions will arise, *by the principles of the common law*, from facts and circumstances, as in Muschamp *v.* Lancaster Ry., 8 M. & W. 421, to show the particular contract in the given case; then, we think, the Supreme Court of Illinois has as much misapprehended the result of the English decisions on the subject as have those other courts, which, as we have shown, have so incorrectly assumed that they were holding *contra* to the English decisions, when really their own decisions were in the strictest harmony with the very cases the doctrine of which they purported to disapprove.

[1] 8 M. & W. 421.

[2] 31 Wis. at p. 630.

[3] See *supra*, p. 171.

law, and not as to the right or wrong construction of a system of law common alike to the places of forum and contract. And we are of the opinion that, on the principles of the common law which govern the decisions of the courts alike in Wisconsin and Illinois, there is nothing in the soundly-decided cases on the subject in England or America that is at all inconsistent with the holding in Milwaukee & St. Paul Ry. Co. *v.* Smith,[1] that the appellants ceased to be liable as carriers after they had, in accordance with a well-established and general usage, unloaded the goods of the appellee at La Crosse; regularly delivered them "as forwarders," to the connecting carriers, and received their pay for their freight of the goods, from Milwaukee to La Crosse. But we are very far from agreeing with Dixon, C. J., in the Wisconsin case,[2] where he put it, as entirely independent of contract, that in England, under what he calls the rule in Muschamp's Case, the first carrier is liable, "*as such*, for the safety of the goods throughout the transit and until they are delivered at the place of destination." The first carrier is liable, "as such," beyond his own immediate route, if he "specially" contract so to be; and where he receives, for carriage, goods marked specifically for a destination beyond his own immediate route, this fact alone is some evidence from which a jury may infer a contract to carry those goods to that place for which they are so marked for carriage. And this inference may be strengthened, on the one hand, as in Muschamp *v.* Lancaster Ry.,[3] and in other cases, English and American, by their being charged one through rate, paid or to be paid, for such entire carriage; or by other circumstances, as in those cases which show the entirety of the contract; or, on the other hand, weakened, or absolutely rebutted, as in so many other equally as well-decided cases, where there is an express agreement limiting the liability to the carrier's own immediate route; or where the circumstances so imply, such as from the payment made or to be made for the carrier's own portion of the route only; his discharging the goods at his own terminus; delivering them, as a forwarder, over to the next carrier, taking a receipt therefor; and the existence of a well-established and generally known usage to act as a carrier over his own route alone, receiving payment therefor, and acting thereafter simply as a forwarder. As we have shown by our very full review of the cases, both English and American, the whole mass of them, with a few insignificant cases, are in the most perfect accord with these principles.

Equally incorrect with Dixon, C. J., is, we think, the Illinois

[1] 74 Ill. 197.
[2] 31 Wis. at p. 636.
[3] 8 M. & W. 421.

court, in Milwaukee & St. Paul Ry. Co. *v.* Smith,[1] where they distinguish between what they call the present rule of the common law in England,[2] and "the received doctrine among the courts of this country;" intimating that, in the latter, "the carrier was not responsible beyond his own route, except upon his special undertaking so to be liable;" but that, in England, the carrier was bound to carry and deliver the goods marked for a particular place beyond his own route, without such special undertaking.

The matter in England, as, in this investigation we have so often shown, is, and particularly so in Muschamp *v.* Lancaster,[3] put simply on the ground of the special undertaking in the particular case; the contract being implied in that case from the receipt of the goods marked for carriage to the designated place, at one entire payment, and from the other facts and circumstances in the case. But all this was simply matter from which a contract might be inferred, it being admitted[4] that "In cases like the present, particular circumstances might no doubt be admitted to rebut the *inference* which, *primâ facie*, must be made, of the defendants having *undertaken* to carry the goods the whole way."

And it is an utter mistake, as we have shown, to suppose that the law as laid down in the Muschamp Case is at all counter to the law in England as previously decided. We look upon the law as decided in England, some fifty years before the decision in the Muschamp Case, substantially the same as in that case. Thus in Hyde *v.* The Trent Nav. Co.,[5] decided A. D. 1793, the defendants, although making a separate charge for carriage on the river Trent and on their own canal; a separate charge which they received for its proprietor for carriage on a connecting canal, as well as a separate charge for storage in a warehouse, which they did not own; and, besides, they made a charge for cartage, which, the plaintiffs knew, was for an independent carter; yet the court held, quite in accordance with the holding in the Muschamp Case, that they were liable as carriers for a loss by an accidental fire in the warehouse; the implication from the facts being that the conveyance by the carter was made by the defendants a part of their contract of carriage.[6]

[1] 74 Ill. at p. 200.

[2] Dating from A. D. 1841.

[3] 8 M. & W. 421, 425, *et seq.*

[4] As was said by Lord Abinger, C. B., at p. 429.

[5] 5 T. R. 389.

[6] The language of Buller, J., at pp. 396, 397, separated from its context, is very much more open to misunderstanding than that of Rolfe, B., in the Muschamp Case. Buller, J., there says: "According to the defendants' argument there must be two contracts in all cases where goods are sent by a coach or a wagon; but I think the same argument tends to establish the necessity of three, — one with the carrier, another with the inn-keeper, and a third with the porter. But in fact there is but one contract. There is nothing like any contract or even communication between any other person than the owner of the goods and the carrier. The carrier is

The case of Erie Ry. Co. *v.* Wilcox [1] is one where the judgment, reversing the judgment of the court below, was by a divided

bound to deliver the goods, and the person who actually delivers them acts as the servant of the carrier. . . . The different proprietors may divide the profits among themselves in any way they choose, but they cannot by their own agreement with each other exonerate themselves from their liability to the owner of the goods. The carriers have the direction of the goods, and are responsible for them until they are delivered to the owner; and here the defendants insisted on receiving a certain sum of money for the whole expense of carrying and delivering, including the identical charge of cartage, before they would take the goods into their vessel. If the carrier and porter were to make separate contracts with the owners of the goods the latter would have the option of sending his own carts to bring away his goods; whereas here the defendants put the goods into the Duke of Bridgewater's warehouse at once, in order to send them afterwards to the plaintiffs by a particular cart of their own." This last is specially applicable to the Muschamp Case, as there the goods were deliverable by the carriers at Bartlow, in Derbyshire, "a place about eight miles wide of the railway;" and, under the implied contract, the shipper had a right to have the goods forwarded to that ultimate point, where, as *per* the terms of the only contract he had made, the entire through freight was to be paid. The matter is admirably put (entirely clear of the usual mistakes made one way or the other in the cases) by the Supreme Court of Illinois, Chief Justice Scott delivering the unanimous judgment of the court, in Adams Express Co. *v.* Wilson, 81 Ill. 339. The matter is intelligently treated as simply one of contract, the facts in the case showing what the particular contract was. It was quite competent for the parties to have made a different contract; but the question was, as in all the English cases, simply what was the contract which was made in the particular case. The judgment affirmed the finding of the jury, and the decision of the court in the court below. We set out the judgment, which is brief and to the point, as follows:—

"Plaintiffs delivered a package of goods to the agent of the defendant at Flora, to be carried from thence to Decatur in this State. It was lost, and this suit is to recover its value. There is no controversy that the package was delivered to the company, nor as to its value. No receipt was taken when the package was delivered to the defendant. It was given in charge of the messenger on the train, and *charges paid to Decatur*. The defence sought to be interposed is, that defendant's line terminated at Altamont; and having at that point delivered the package to another carrier to be transported to its destination, it is insisted defendant's liability was at an end. We do not think the position assumed can be maintained. Clearly, the undertaking of defendant was a contract for through transportation. *Plaintiffs wanted the package sent to Decatur, and defendant, with a full knowledge of this fact, accepted the usual charges for carrying it to that point.* No doubt it would have been competent for the company, by *special* contract [this is objectionable, if it is used as synonymous with the term "*express* contract," which is employed in the next Illinois case we state] with the shippers, to have limited its liability to safely deliver the package to another carrier at the nearest point reached by its lines to the point of destination; but it made no effort to do so in that or any other particular. U. S. Express Co. *v.* Haines, 67 Ill. 137. For an adequate consideration, in hand paid, the company assumed the responsibility of a common carrier, unrestricted by any conditions, and it must be held to be bound by its engagement. One of the plaintiffs was upon the same train that carried the package from Flora. He was about to place it in the baggage car when defendant's agent suggested it was express matter. After some conversation, he consented it might be sent by express. It may be fairly said defendant's action induced the belief in the mind of plaintiff that the company would engage to carry the package to Decatur. *No other point was mentioned.* Had he been told the company would only carry it to Altamont, it is more than probable he would not have intrusted the package to defendant at all. *But he wanted it sent through to Decatur, where he was going himself to receive it. Having accepted the usual charges on the package to the point of destination, without exacting any limitations of their duties from the shippers, we must regard the undertaking of defendant as an engagement for through transportation;* and nothing short of the act of God, or the public enemy, could relieve it of its duty to perform its contract as a common

[1] 84 Ill. 239.

court. We think that, on the facts, the finding and decision of the court below were so obviously wrong, that we look in vain in the actual holding in the case, in the Supreme Court, for any reasonable ground upon which any dissent from the judgment can be based. But while we think the decision itself is correct, we find again the unfortunate use of the term "express contract;" as though the inference, which fairly results from receiving goods represented orally, or by their address, as being for transportation to a designated point, that they are so received or accepted to be carried there, as in Adams Express Co. *v.* Wilson[1] can only be rebutted by an *express* contract. If it were so put in the English cases, we could quite understand why in so many of the cases in this country which are not only well decided, but are in the strictest harmony with the English cases themselves, the latter are disapproved. But the English cases simply hold that that is some evidence of the fact, warranting such an inference; but, as is usual in any contract resulting or arising from mere implications or inferences, such evidence may be affected by other surrounding facts and circumstances, so as, on the one hand, that such evidence may either strengthen such inference as to make it absolutely conclusive; or, on the other hand, weaken or entirely destroy it. Or, in effect, accepting the suggestions of the Missouri case,[2] the great mass of the American cases on the subject can be harmonized with the well-decided English cases, by simply considering the use of the terms "special contract," "positive contract," "express contract," in the former, as merely expressing *contract*, either express or implied.[3]

carrier. The receipt given for the goods after the loss occurred in no manner affected defendant's responsibility, or relieved it from any of its common-law duties *under the original undertaking*, and we have not deemed it necessary to consider any of the conditions contained in it. Whatever conditions and limitations it may have contained were not assented to by the shippers, either before or at the time the goods were delivered to defendant, and hence do not affect the carrier's liability one way or the other. The judgment must be affirmed." The facts in Adams Express Co. *v.* Wilson, 81 Ill. 339, are essentially the same, in their leading particulars, as those in Muschamp *v.* Lancaster Ry., 8 M. & W. 421; and we doubt very much if there is this day any court in the United States, of anything like fair intelligence, which would hold counter to Adams Express Co. *v.* Wilson. And if not, their adverse criticism of Muschamp *v.* Lancaster Railway, decided under similar facts and the same principles, is surely not well founded.

[1] 81 Ill. 339.

[2] Cited *supra*, p. 159, n. 2.

[3] The following, from the judgment in Erie Ry. Co. *v.* Wilcox, 84 Ill. at p. 240, with this explanation and qualification, is quite accurate and applicable to the well-decided cases on the subject in England and America. Without it, it is inaccurate and of doubtful application. "Whatever contrariety there may be in the decisions of courts in respect to the duties and obligations of common carriers, it is settled, as firmly as any legal proposition can be, such carrier is not bound to assume responsibility for the transportation of goods beyond the terminal points reached by its own conveyances. It is optional whether the carrier will take upon itself the enlarged responsibility of making the connecting carriers its own agents for the transportation of goods rather than the agents of the shipper.

The Illinois Appellate Court, in Chicago & N. W. R. R. Co. *v.* Church,[1] express themselves more carefully on the subject than is usual with the courts and text writers in this country. The question involved in the case was as to the power of a railroad corporation to limit its liability, under the Illinois Statute,[2] with respect to goods shipped for a point beyond its own terminus. The court said: "We are inclined to hold that the common-law liability contemplated by the Statute is the common-law liability which attaches to the common carrier *from the fact of the contract to carry*. That it does not apply to a case like this where the carrier is under no obligation at common law to undertake to carry goods beyond its own line.[3] No common-law obligation attaches to carry safely according to the rules of the common law *until there is a contract for carriage* actually made to carry beyond appellant's line. *Then and not till then does the common-law liability attach to safely carry such distance.* It is true it has

Although the cases elsewhere are not harmonious, the rule adopted and uniformly adhered to in this State is, the acceptance of goods delivered for carriage, marked to a point beyond the terminus of the carrier's lines, will be construed, *primâ facie*, as a contract for through transportation. Notwithstanding the goods may be thus marked, the carrier, by express [? or implied] contract, may limit its obligation to carry safely over its own lines, or only to points reached by its own carriages, and for safe storage and delivery to the next carrier in the route beyond. A clause in the receipt given to the owner for the goods restricting the carrier's obligations in this respect, if understandingly assented to by the shipper, will as effectually bind him as though he had signed it. *What the contract between the shipper and the carrier is, is a matter of evidence.* Illinois Central R. R. Co. *v.* Copeland, 24 Ill. 332; The Same *v.* Johnson, 34 Ill. 389; The Same *v.* Frankenburg, 54 Ill. 88; The People *v.* Chicago & Alton R. R. Co., 55 Ill. 95; Chicago & N. W. Ry. Co. *v.* Montfort, 60 Ill. 179; United States Express Co. *v.* Haines, 67 Ill. 137."

"*What the contract between the shipper and the carrier is, is a matter of evidence!*" Perfectly true! Why, then, (1) on the one hand, should the important fact, that the goods being received for carriage to a named point, raises an inference on the part of the party so receiving them for carriage, that he receives them for such carriage to such named point, be eliminated from the facts which go to show what the specific contract is? And, (2) on the other hand, why should any other facts from which, connected with that, it can be shown that the contract to be implied from all of such facts was to carry the goods only a portion of the distance to the named point, and there, simply as forwarders and as agents for the shippers, to deliver them to some one else, to carry them for the shippers to the named point, be any the more eliminated from the "evidence" which goes to show "what the contract between the shipper and the carrier is?" We think that in the first case put, as in the last, the answer, quite too clear for the existence of even a scintilla of doubt, is, that, as "what the contract between the shipper and the carrier is, is a matter of evidence," all such evidence, being material and substantial, is admissible; and that the construction of the contract of a carrier, from the facts and circumstances surrounding the particular case, is no more difficult, and is unaffected by any other rules than those ordinarily applicable to the construction of contracts. The English decisions on this subject are the result simply of the application of such rules; and, as we have shown in our analysis of such cases, there is nothing whatever in Muschamp *v.* Lancaster Ry., 8 M. & W. 421, or in the New York case (see *supra*, p. 116) decided in the same way concurrently with it, that introduces any principle applicable to the construction of a carrier's contract which is not, in effect, as old as the law of contracts itself, or which, as far as it can analogously be applied, could not be applied to the construction of any other contract as well as to that of a carrier.

[1] 12 Ill. App. 17.

[2] R. S. of 1877, ch. 114, § 82.

[3] As will be seen, *infra*, we rather question the correctness of this.

been held by the Supreme Court of this State that if the carrier received the goods marked to a destination beyond its own line, that then the presumption of the law is that it was a contract of carriage to the place marked on the goods, and all the common-law liability attaches. . . . The reception of the goods so marked is, as was said by the court in Erie R. R. *v.* Wilcox,[1] *primâ facie* evidence of through carriage; *subject, it must be presumed, to be controlled by a different contract.* The taking possession of the goods for shipment and the bill of lading may be one and the same transaction, *and the bill of lading may explain the primâ facie case of through carriage resulting from the reception of the goods marked 'through.'* And in this case, according to the agreement, we think it does. The receipt shows that the appellant was only to carry the goods to the end of its own line, and there deliver them to another to be transported to North Anson, Me.; expressly exempting itself from liability beyond its own line, and the appellees took and accepted such receipt with full knowledge of its provisions, and, we think, *presumably intending to accept its conditions as the contract.* The simple delivery, however, of the receipt to the shipper would not be conclusive upon him as to the contracts contained in it."

While we think, very much, although not exactly, with the court, that the railroad corporation, under the statute, could not "by any stipulation or limitation expressed in the receipt limit their liability" — called in the statute their "common-law liability" — for the non-delivery of the goods "to the place to which the goods are to be transported;" yet, we think, that, connected with the fact of the shipper's knowledge, the receipt or bill of lading might be given in evidence to show what, *ab initio, was the nature of the contract that was actually made between the parties.* This would not be a reliance on a restriction in the receipt, but would go to show that the carriers had never contracted to carry the goods beyond their own terminus. However this may be, we think it perfectly clear that, independent of the statute, the Illinois Appellate Court has well laid down the principles of the common law applicable to these cases, and particularly so, in their avoidance of the usual terms, "special contract," "positive contract," "express contract;" the doubtful or absolutely incorrect use of which terms has caused not a little of the uncertainty which has been cast about so many of the cases in this country, which, actually, on the facts in them, have been well decided.

We would further observe on the the above case, that the stat-

[1] 84 Ill. 239.

ute itself seems to be the outcome of the mistake made by the Supreme Court of Illinois in holding, as in effect they do, that there is a common-law liability, independent of contract, on railway companies, to carry goods, as common carriers, beyond their own line, where they have received them marked for such a point, and from which liability they can only relieve themselves "by *express contract*." The Court of Appeal has more properly held, in accordance with the views we have expressed so constantly in this investigation, that that is a fallacy; that — as we have shown the English cases hold — it is a liability *arising only out of contract;* and, therefore, that all the facts and circumstances — the receipt of the goods for carriage marked for a specific destination being simply one of them — must be considered in order to decide what the particular contract is. This being so, then, as there was no "common-law liability," except so far as a liability arose by the particular contract made in the case, it was competent for the defendants, notwithstanding the statute, to show, by the receipt or bill of lading and the accompanying facts, the knowledge and the implied assent of the shipper to its terms, and, therefore, what the contract actually was. And as, by the very terms of the contract, the defendants only undertook as carriers to convey the goods to their own terminus, and then to forward them, they had not, in even apparent contravention of the terms of the statute, to avail themselves "of the stipulations or limitations expressed in the receipt" to relieve them from a liability which they had never assumed; the liability, whatever it was in the case, being simply a contract liability, and not such an one as is implied by a "common-law liability," which may exist independently of contract. While, in this way, we reach the same result as the Appellate Court, we think we make the construction of the statute clearer than they have done, and show that the statute, according to its express phraseology, applies to cases to carry and deliver goods as well beyond a railway company's own immediate line as within it; a point which the Appellate Court at first deny and then put only as a possibility, — "It may be," etc. The construction of the statute, we think, then is, that where an implied contract is made by a railroad company to carry goods beyond their own terminus, they cannot relieve themselves of their liability by a stipulation or limitation in a receipt which has not formed a part of the contract. Of course, they could not do so in the face of an express contract; and, therefore, where, from the receipt of goods marked for shipment to a point beyond their own terminus and from any other facts and circumstances, an implied contract has arisen for them to carry the goods safely, as common

carriers, they cannot, under the statute, relieve themselves from their liability by such a stipulation or limitation in the receipt, which has not formed part of the contract. The difficulty under the statute is evidently the result of the mistake in the Supreme Court, which the Appellate Court rectify; showing, as they do, that the other facts and circumstances of the case may "explain the *primâ facie* case of through carriage resulting from the reception of the goods marked 'through.'" The case we think a most valuable one to show the correctness of what we have been seeking to impress throughout this very full investigation of a most important subject; which, while in England is in so clear and simple a position, in this country has been involved in the most apparently inextricable confusion.

The case of Bennett *v.* Filyaw[1] is very often cited as being in harmony with the English cases, and in principle it is so, although it is not on the exact question involved in them. In this case goods were shipped near Mount Vernon by a steamer running between that place and the city of Apalachicola, and, in a suit for the loss of the goods, it was claimed that no place of delivery for the goods had been shown. Very much in effect as in Muschamp *v.* Lancaster Ry.,[2] the court below instructed the jury that if they were satisfied from the evidence that the steamer was bound for Apalachicola, they might infer from that fact, in the absence of an express agreement upon the subject, that the plaintiff's goods were to be delivered in Apalachicola, as alleged in the declaration, and refused to instruct them that no terminus of the voyage in question was proved. The Supreme Court sustained the court below both as to the instruction given, and as to that which was overruled.[3]

[1] 1 Fla. 403.

[2] 8 M. & W. 421.

[3] In doing so they say: "It was clearly proved on the trial below, as appears from the testimony brought up by the bill of exceptions, that the plaintiff in error was the master of the steamboat in question, plying to and from the city of Apalachicola, on the Apalachicola River, in the year 1842, in answer to an interrogatory to that effect to which no exception was taken. It was further testified by one of the witnesses, that certain boxes of tobacco, of the crop of 1842, belonging to the defendant in error, were taken by the latter, the same year, to his lower place, for the purpose of being shipped to Apalachicola, and these boxes were spoken of by the same witness as having been sent off to Apalachicola at the time before mentioned. It is fully proved, too, that these boxes were shipped on board said steamboat as alleged in the declaration. Whether this, with other evidence adduced, was sufficient to satisfy the jury that these boxes of tobacco were shipped for Apalachicola, as the terminus of the voyage as alleged, was clearly a matter of fact which it was their province to determine, and not one as to which the court should charge them. If they erred in regard to this question of fact, the remedy of the defendant below was by motion for a new trial on that ground. We therefore think that the court below did not err in overruling this instruction, nor do we consider that it erred in giving the last excepted to. The instruction last mentioned would seem to be to the effect, that if it appeared that the steamboat was bound for Apalachicola, and there was no evidence that the same was bound also for some intermediate point, so as to contradict that conclusion, then the jury might

There is also a case in Illinois, decided A. D. 1840, and therefore prior to Muschamp *v.* Lancaster Ry.,[1] and decided in principle very much in the same way. It was a case where a bill of lading was given for goods shipped by the defendant's steamer, addressed to the plaintiffs at Peoria, for which a bill of lading was given for the goods to be delivered at Peoria, the shippers "paying freight for the said goods at the rate of $1 per hundred." In the margin was written, "With privilege of reshipping on any good boat." The goods having been lost from a connecting steamer, the defendant claimed he was not liable for the loss. The court below having found for the plaintiff, the judgment was sustained. The Supreme Court, in sustaining it, said: "What change in the terms of this contract did the words 'with privilege of reshipping on any good boat,' written in the margin of the bill of lading, produce? Was the master discharged from all obligation in relation to the carriage and delivery of the goods at Peoria, by merely shipping the goods on board 'any good boat?' Clearly not. He was to receive freight on the delivery of the goods at Peoria, for transporting the goods the whole distance. His obligations were consequently coextensive with the reward he was to receive. He could not charge freight *pro rata*, for the distance he carried the goods, and then leave the owner to be charged for the remainder of the distance such prices for freight as the conscience of the master of the boat on which the goods might be reshipped should see fit to demand."[2] This reasoning is equally as applicable where the carrier receives goods for carriage, marked for carriage and delivery beyond his own immediate terminus, under an implied contract, from the facts and circumstances of the case, to carry them to the point designated for their delivery.[3] As this was prior to the decision of the much-discussed English cases, with the views in

infer, in the absence of an express agreement to the contrary, that Apalachicola must have been the terminus of the voyage and the place of delivery. This appears to be a self-evident proposition, and therefore furnishes no ground for exception, if it were otherwise objectionable, and we are satisfied that it is not." We should fancy that no one would question the correctness of this decision, which is the application of the simplest common-law principles in the construction of the particular contract, and which were no more or less correctly applied than were similar principles similarly applied in the well-decided but most strangely distorted case of Muschamp *v.* Lancaster Ry., 8 M. & W. 421.

[1] 8 M. & W. 421.

[2] Dunseth *v.* Wade, 2 Scam. 285.

[3] The following, too, at p. 289, we think is specially instructive: "Had the agreement been, that if the master should reship the goods, he should only receive freight, *pro rata*, for the distance the goods had been carried, a different question would have been presented. In such a case, however, there can be no doubt, that it would have been incumbent on the master to have forwarded, without delay, to the owners or consignees of the goods, a new bill of lading, so that the owner might have evidence against the master of the boat on which the goods were reshipped. Without notice of the reshipment of the goods, the owner, in case of non-delivery, would not know on whom to call for redress, nor how to search for his goods."

which it so thoroughly harmonizes, without being the outcome of them, it is the more significant and important.

We find a very simple case in Alabama,[1] practically identical with Muschamp *v.* Lancaster Ry.,[2] and decided in the same way; that is, decided obviously so correctly that we think there could be scarcely a question as to its correctness. And yet we find the usual language: "The true doctrine, that which is most consistent with all the principles which govern the liability and duty of carriers, and which seems to us required by the same necessity and public policy upon which these principles are founded, is that a common carrier who receives goods destined for a place beyond his own line of transportation, *not expressly otherwise limiting his duty and liability*, must be regarded as contracting for a delivery at the point of destination." We think this, instead of being a "true," is a very false doctrine. It purports to be derived, as a rule, from the English cases; but, as we have shown, the English cases establish no such doctrine. The case itself is an extremely simple one, and can rest quite well on its own merits, without requiring to be propped up by any such unsound principle as that by which it is sought to be supported. The facts show the very simplest possible case of a contract to carry the goods the entire distance. It does seem ridiculous that so much doubt and mystery have been thrown about so simple a matter.

The facts were that the plaintiff shipped goods by the defendants' railway for Texarkana, Texas, and received a receipt or bill of lading from the defendants' agent to that effect, stating that the goods were received from the plaintiff, at Troy, for shipment to Texarkana, Texas, and contained no conditions or stipulations whatever. The plaintiff asked to be allowed to take the goods as baggage usually allowed to passengers, and offered to pay for it. The agent refused, and said it must go as freight, and that he could pay for it at Texarkana, and that it would reach there in three days or a week after plaintiff's arrival. The agent then executed the receipt, and plaintiff accepted it. The goods were lost after they had been transferred to a connecting line on the route. The jury, under the instructions of the court, found for the plaintiff, and the verdict was sustained. We think that facts from which a through contract could be implied could scarcely be plainer; but it is equally as clear that, under a different state of facts, such, for instance, as if the defendants had exacted and been paid freight for their own portion of the road only, a very different contract might have been implied, and they would not

[1] Mobile & Girard R. R. Co. *v.* Copeland, 63 Ala. 219.

[2] 8 M. & W. 421.

have been liable even though there had been no express contract limiting their contract liability, as carriers, to their own route only.

We notice in some of the Tennessee decisions which purport to follow the English cases, the same misimpression as to the actual holding in the latter. Carter *v.* Peck [1] is free from this mistake. There the plaintiff bought from the defendants, proprietors of stage coaches connecting with others, tickets over the entire route, paying for them in full. The court held that this was a contract with the defendants for conveyance over the entire route, for a breach of which the defendants were liable, no matter on what portion of the route the contract was violated.[2]

The law in East Tennessee & Ga. R. R. *v.* Nelson,[3] with reference to the duties and contracts of a carrier, is correctly laid down. "The law is, that in the absence of a special contract, the carrier is bound to perform his duty, *i. e.*, deliver the goods at their destination, or at the end of his route to the next carrier, in a reasonable time, according to the usual course of his business, with all convenient dispatch. And if the carrier, or his servant, within the scope of his employment and duty, enter into any special contract [which, of course, may be either express or implied] to deliver, in any particular time or place, *even beyond the terminus of his particular route*, it will be binding."

In East Tennessee & Va. R. R. Co. *v.* Rogers,[4] a receipt was given for goods "for H., Atlanta, . . . to be forwarded" by the defendants' road. "To be forwarded" was construed "to be

[1] 4 Sneed, 203.

[2] The mere statement of such cases is sufficient to show their correctness. The court said: "We think that when the defendants received the plaintiff's money, and gave him through tickets, they thereby became bound for his transportation on the entire line, and that he was entitled to a strict performance by the defendants of their undertaking, or to recover compensation in damages for any breach thereof. The arrangement between the defendants and the proprietors of other portions of the line was a matter with which the plaintiff had nothing to do. He was no party to that agreement, nor was he bound to look to any person for the performance of the defendants' undertaking but themselves. If either party to that agreement was guilty of a breach, that was a matter for adjustment between themselves. By this arrangement, the proprietors at each end of the line were authorized to receive the fare and give through tickets, to show that they had undertaken and received pay for the transportation of the passenger over the entire line, and the proprietors of the other portions of the line were their agents, whom they trusted to perform that part of their contract which lay on the portions of the line owned by them. If this view of the subject be correct, and we think it is, then it was wholly immaterial whether the plaintiff knew of this arrangement or not. If the defendants, when they sold plaintiff the tickets, intended that he should risk the proprietors of the other portions of the line to carry him through, then they should have so stipulated and informed him frankly of this arrangement, so that he might, with a full knowledge of the facts, have elected whether he would pay them the entire fare and take through tickets, or pay them only for that portion of the line of which they were the proprietors, and make his own arrangements for the balance of the journey. They assumed, however, to carry him through, and are responsible for the undertaking."

[3] 1 Coldw. 272, 276.

[4] 6 Heisk. 143.

transported or carried," and the defendants were held liable for loss of the goods on the connecting road, under what, the court held, was an express contract to convey the goods to Atlanta. But the head-note of the case goes much beyond this. It is: "A carrier receiving goods delivered to him for transportation, marked and destined to a point beyond his own line, undertakes, *in the absence of an express agreement to the contrary*, to deliver the goods to the consignee." While, as we have shown, this is not the *rationale* of the case, it does really express the views of the court.[1]

[1] They say (at p. 146), : "The English courts, with great unanimity, hold that the carrier giving the receipt and undertaking the carriage of goods from one point to another, is responsible for all the intermediate routes, unless he shall *by express contract* limit his liability to the transportation of the goods only to the end of his own road." The court reach this conclusion as to the holding of the English courts, thus (at p. 148): "The leading case in England on this question is that of Muschamp *v.* The Lancaster, &c. R. R. Co., 8 M. & W. 421, in which it was held by the Court of Exchequer 'that where a carrier receives goods directed to a place beyond the terminus of his own route, without limiting his responsibility by express agreement, such receipt of the goods so directed is *primâ facie* evidence of an undertaking to carry the goods to the place where they are directed, and that the rule applies although the place be beyond the terminus of his own usual route, and, a loss having occurred in that case beyond such terminus, the carrier was held liable for such loss.'" This quotation, by the court, is evidently second-hand, and is, in part, not a strictly accurate statement of the *nisi prius* direction of Rolfe, B., to the jury. What he really did say, in summing up, was (at p. 423): "That where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier." This is very far, even as it stands, from warranting the conclusion that the party "undertaking the carriage of goods from one point to another, is responsible for all the intermediate routes, *unless he shall by express contract limit his liability to the transportation of the goods only to the end of his own road.*" Here, they entirely change the meaning of Rolfe, B., and treat what he says would be *primâ facie* evidence of the fact, as being *conclusive* evidence of that fact. Of course, if there was an express or "positive" (which is the word he uses, and which is less strictly technical than *express*, and which has probably led to the use of another synonym, *special*) agreement limiting the carrier's responsibility to a particular place, there would be no room for an implication in the matter, as it is one wholly of contract. But, in the absence of such a contract, then the taking charge of the parcel which is directed to a particular place, is, of itself, aside of anything else, *primâ facie* evidence, that as the shipper is sending it there, so the carrier is to carry it there. But this is, alone, merely *primâ facie* evidence of this fact, which may be strengthened, as we have so often put it, by other facts; or, on the other hand, be weakened, or conclusively rebutted, by other facts. It is simply some evidence of the fact, "whence," as Lord Abinger puts it, "the jury might infer that they [the carriers] undertook to carry it [the parcel] in safety to that place." But, even in the absence of a positive or express contract in the matter, the acceptance of the parcel "to be carried on to a more distant place," is not conclusive evidence of the carrier's undertaking to carry it there. As Lord Abinger again put it (at p. 429): "In cases like the present, *particular circumstances might no doubt be adduced to rebut the inference which, primâ facie, must be made of the defendants having undertaken to carry the goods the whole way.* The taking charge of the parcel is not put as *conclusive* evidence of the contract sued on by the plaintiff; *it is only primâ facie evidence of it.*"

This does not at all agree with the view of the English law in the matter which was entertained by the court in East Tennessee & Virginia R. R. Co. *v.* Rogers, 6 Heisk. 143, 146; but, as we have so fully

Among all the American cases we have so far examined, in which the English cases are noticed, we have found none in which the holding in those cases is so properly appreciated as by Chief Justice Waite in Elmore *v.* The Naugatuck R. R. Co.,[1] and by the Illinois Appellate Court in Chicago & N. W. R. R. Co. *v.* Church;[2] the reasoning on the subject in the Supreme Court of the United States being about the worst to be found in any of the cases. But we find in the next Tennessee case we examine[3] a thoroughly correct appreciation of the law as it is to be deduced from the well-decided cases in England and in this country, whether prior, concurrent with, or subsequent to Muschamp *v.* Lancaster Ry.[4] Thus, after quoting Lord Abinger's statement of Rolfe, B.'s, instructions to the jury in the latter case, the Tennessee court correctly say: "The extent of the undertaking, however, might be repelled by circumstances showing the contract to have been only for the length of their own line of road, as where the freight was only paid as far as the terminus of their own road, and the rest was to be collected on delivery." The court add, "though the contrary has been held, in one case at least, in England." The case is not named, and we think the remark is the result merely of a misunderstanding of what was held in the very doubtfully decided case of Bristol & Exeter Ry. Co. *v.* Collins,[5] fully considered by us.[6]

shown, *supra*, pp. 75–96, it is the actual holding of the English courts; and, as we have also shown, harmonizes with the *ratio decidendi* of numerous cases in this country which have generally been incorrectly assumed to have established a "rule" opposed to that to be deduced from the well-decided English cases.

[1] 23 Conn. 479 *et seq.*

[2] 12 Ill. App. 17.

[3] Western & All. R. R. Co. *v.* McElwee, 6 Heisk. 208.

[4] 8 M. & W. 421.

[5] 7 H. L. Cas. 194.

[6] *Supra*, 81 *et seq.*

As there is much in the remainder of the judgment of the Tennessee court which meets our views on some of the points involved, we quote here fully from it. Says Freeman, J., delivering the unanimous judgment of the Supreme Court: "We think the case of Carter *v.* Peck, 4 Sneed, 203, however, is an emphatic indorsement of the principle of the English rule, and is the proper one in all such cases. It is true in that case there was sold what is known as a through ticket, but *that was only evidence of the undertaking of the party*, and *such undertaking might equally well be made out by other facts*. What then is the fair meaning of the undertaking of the railroad company, in view of the known course of business, and the attending circumstances in any case of shipment of goods upon one road to be transported to another beyond its terminus? We think it can only be, where no special contract is insisted on limiting the undertaking, that the party receives it with the obligation to carry or have it carried to its destination, and that the recipient knows his own business arrangements, and relies upon the facilities possessed by him to comply with his undertaking. If he has no such means of transmission as is demanded by the shipper, it is his business to notify him and limit his contract with him to the extent of his own capacity to fulfil it; the other party has the right to rely on the party having the means of transmitting the goods to their destination. *By the fact that the goods are consigned beyond the terminus of his own line, he is notified of what the shipper desires him to undertake to do for him, and if not able or unwilling so to undertake, it is but fair that he should be required to say so, and then the extent of his liability be clearly understood.*

"In looking into the American cases,

In Louisville & Nashville R. R. Co. *v.* Campbell,[1] the head-note is: "Where a railroad company, without contracting for restricted liability, receives goods consigned to a point beyond its terminus but on the line of a connecting route, it is bound to deliver them at their destination. But where goods so consigned are received

it will be found that numerous cases have held as above indicated. In the case of Angle *v.* Mississippi R. R., 9 Iowa, 487, Mr. Justice Woodward lays down the rule thus: 'We are clearly of the opinion that where goods are delivered to a railroad company, marked to a place beyond their road, and unaccompanied by any other direction but the mark, the company is bound to deliver according to the mark, although parol evidence is admissible where receipt is given to vary the contract, as it is only *primâ facie* evidence from the receipt that they undertook to carry the whole way, and the company would be exempt if an unvarying usage to deliver at the terminus of their road was proved, and knowledge of such usage brought home to the consignor.' This is a correct statement of the rule, with perhaps the qualification or explanation that if the receipt given was not only a receipt by which the possession of the goods was acknowledged, but also contained an express contract to transport to destination, this contract would not be subject to be varied by parol proof, by reason of the fact that the simple receipt was found in the same paper; and then, further, that the unvarying usage spoken of should not only be that the road receiving was in the habit of delivering to the other road at the terminus of its own line, but that it only undertook to transport as far as its own line, and charged to shipper freight and collected it from him alone for the transportation on its own road. In other words, that the fact that the receiving road universally used the connecting line as a means of sending the goods to their destination when sent to points beyond the terminus, would not be evidence to rebut the undertaking, expressed or implied, on receipt of the goods, to carry to destination, unless it was shown that its usage was uniform only to undertake for its own line, and it received freight only for this service from the shipper. If the receiving road shall send the goods on to the next line, and there receive its freight from the next road, or, by an arrangement with the connecting line, the freight should be collected on delivery, and *pro rata* paid to the first road, as is the custom, we believe, of perhaps all roads; the last road is the agent of the first, and not specifically of the shipper, and in that case is but the means used by the first receiver of carrying out his contract to carry or transport to its destination. As said by an English judge: 'It is better that those who undertake to carry parcels for their mutual benefit should arrange matters of this kind among themselves, and should be taken each to have made the others their agents.' We think this the sounder view of the question, based on the general interests of trade, and of those engaged in shipping goods by this almost universal means of transportation. It would be exceedingly hard if the shipper of a small but valuable package at Boston should be compelled to trace the package from that point along all the intervening lines over which it might possibly pass in order to reach Tennessee, in order to find who was responsible to him for his loss.

"It is said in argument, however, that the books of each company would show the receipt of the package. That may be, and is true, no doubt; but then, the books are their own, and may or may not be exhibited to a single shipper, or may not possibly show the truth of the case. At any rate it would not be proper that the shipper should be compelled to rely on the evidence to be furnished by the company sought to be held liable to sustain his right. On the other hand, it imposes no hardship upon the other roads, because they are in constant communication, interchange business, and the books of the road originally shipping would show it was received by the other, and would be always in their possession and of ready access. Thus the inconvenience to the road would be much less than to the single shipper of a parcel, who might never have another transaction with any of the companies during his life. All hardship in the rule can be easily obviated by the railroad companies, if it is felt, by making a special contract, or giving a special receipt, and taking freight only from the shipper for their own line. They cannot be allowed to have the advantage of undertaking for their own benefit to carry to the point of destination, either expressly or by fair implication, and then escape the responsibility incident to the undertaking when loss occurs." Western & Atl. R. R. Co. *v.* McElwee, 6 Heisk. (53 Tenn.) 215 *et seq.*

[1] 7 Heisk. 253.

under a contract restricting the liability of the company as a carrier to their delivery at its terminus, it is then bound to deliver them there with all convenient speed, according to the usual course of business, to the next carrier; and if there is none ready at the terminus to receive the goods and forward them along the proper route, then it ought to retain them and notify the owner. The company is not bound in such case to transport the goods beyond its terminus upon any link, however short, of the connecting route, unless its established usage imply such an undertaking." In Railroad *v.* Stockard [1] the defendants received goods marked, for the plaintiff, "Jackson, Tennessee," but failed to deliver them there, owing to their refusal to deliver them to a connecting railway company without payment of freight and charges, which the latter company refused to pay. The court held that the defendants having received the goods so directed, without any special contract limiting their undertaking, the obligation was imposed on them to deliver them to their destination, and they would not be excused for their failure to deliver them there by reason of the facts alleged, although the destination of the goods was beyond the terminus of defendants' road. While these decisions were adhered to, it was also held in Memphis, &c. R. R. Co. *v.* Holloway,[2] that the connecting roads were also liable where a loss was caused by their negligence; and, with some doubt, it was held, where goods had been abstracted from packages, *en route*, that the burden of proof would be on the last line of the road to show that they, having received the packages without objection from the previous line, had not, by their negligence, caused the loss.[3]

We find in Angle *v.* The Mississippi & Mo. R. R. Co.,[4] in the contention of counsel, the stereotyped misstatement of the law in England, thus, without any qualification: "In England the rule is, that a mere receipt by a railway company, of goods marked and directed to a place beyond the terminus of their road, makes them liable, as carriers, to the point of destination." [5] In this case there was a written receipt for the goods "to be delivered in like good order;" no place of delivery being named, but the marks on the goods, "H. G. Angle & Co., Cedar Rapids, Iowa," were inserted in the receipt. The goods were burnt by an accidental fire, after they had been delivered to a connecting carrier. In a suit against the receiving company, the court below held that

[1] 11 Heisk. 568.

[2] 9 Baxter (68 Tenn.), 188.

[3] See further Furstenheim *v.* Memphis & Ohio R. R. Co., 9 Heisk. 238; Louisville & Nashville R. R. Co. *v.* Weaver, 9 Lea, 38, which are in accord with the previous Tennessee cases on the subject.

[4] 9 Iowa, 487.

[5] And, as usual, for this Redfield on Railways, 281, is cited.

they were not liable as carriers beyond their own route. The Supreme Court of Iowa reversed this judgment.[1]

The cases in South Carolina[2] all purport to be decided in accordance with the English cases.

[1] In doing so they said: "The question here made is one of practical importance, and it is this: When goods are delivered to a carrier, marked for a particular place beyond the terminus of his route, but unaccompanied by any other directions for their transportation and delivery, except such as may be inferred from the marks themselves, is he bound to carry and deliver them according to the marks, or is he discharged by transporting according to the usage of the business in which he is engaged? In other words, do these receipts constitute a contract to deliver at Cedar Rapids, and can parol evidence be received to show facts tending to give a different meaning to the contract? The court held that it was not a contract to deliver at Cedar Rapids. It seems as if this were easily settled by asking, if this is not the meaning, what is? *To whom, then, and where were they to deliver?* . . . It is easy for the carrier, in such a case, to express the point of carriage in the receipt, if it be different from the marks; and if he does not, as in the case at bar, it is implied that he is to deliver according to the marks." But the court also held that, in the construction of the contract, as was intimated in one of the English cases could be done (see *supra*, p. 77), proof of the extent of the defendants' line might be given, as well as proof of established usage, in the light of which the contract might be construed, and which might, therefore, show a contract that the goods were to be carried by the defendants to their own terminus only, and there to be forwarded by them.

It is very obvious in this case (see p. 494) that, an entirely different meaning is given to the term "*primâ facie*," as used by Rolfe, B., in Muschamp *v.* Lancaster Ry., 8 M. & W. 421, from that which he intended; as though it meant, as used by him, expressly what Lord Abinger in the same case said it did not mean, — "*conclusive.*" In very many other cases in this country the same view seems to be taken of Rolfe, B.'s, meaning, which has led to much apparent antagonism in many of those cases to the English decisions, with which, as we have shown, they are really in perfect accord. And in the latter portion of the Iowa decision, it seems to be implied that they think on that point they are holding *contra* to the English decisions. But, in the later Iowa case of Mulligan *v.* Illinois Central Ry. Co., 36 Iowa, 181, 186, this is put more correctly and intelligently. It is there said of the holding in the previous case: "In Angle *v.* The M. & M. Ry. Co., 9 Iowa, 487, the rule was settled as it is understood to exist in England, and it was held that the acceptance by a carrier of goods marked to a destination beyond the terminus of its road, creates a *primâ facie* liability to transport to and deliver at that point, which may be modified by proof of a different usage known to the shipper at the time of making the consignment." And again: "Whenever liability for such transportation exists it arises either from express contract or from an implied agreement arising from the acceptance of goods consigned to points beyond the *termini* of their routes. As they are originally under no obligation to undertake to transport them beyond the end of their lines, it is clear that they may, by special agreement, stipulate that they shall not be liable beyond such point." This not only thoroughly agrees with the English cases; with the statement of the law by Waite, C. J., in his dissenting judgment in the Connecticut case, and with the intelligent judgment of the Illinois Appellate Court, but also harmonizes with the great mass of the American cases which have been incorrectly assumed to have been decided *contra* to the English cases.

[2] Bradford *v.* The South Carolina R. R. Co., 7 Rich. 201; Bradford & Patton *v.* The same, 10 Rich. 221; Kyle *v.* The Laurens R. R. Co., 10 Rich. 382; Piedmont Manufacturing Co. *v.* Columbia, &c. R. R. Co., 19 S. C. 353. In this last case cited, Simpson, C. J., in delivering the judgment of the court, says: "There is really no great difference between the English and American doctrine on this subject. The one holds that, to exempt a carrier from liability beyond its terminus, there must be a special contract to that end. The other, that to make the first carrier responsible, there must be a special contract to that end. Both admit that the carrier is not bound to go beyond the terminus, but that he may do so; and if he undertakes to do so, he is bound by his undertaking. In the one case, if the contract contains no exemption, it is absolute; in the other, if conditions are specified, they must govern. This is nothing more than saying that the whole thing is *per* contract, and that whatever the contract is, that must be enforced, — the legal

As a new point is raised in one of the New Hampshire cases, we will now examine the cases in that State. The case of The Nashua Lock Co. *v.* The Worcester, &c. R. R. Co.,[1] is one of the best-reasoned cases on the subject which we have found. The head-note of the case is, "Where several common carriers are associated in a continuous line of transportation, and, in the course of the business, goods are carried through the connected line for one price under an agreement by which the freight money is divided among the associate carriers, in proportions fixed by the agreement; if the carrier at one end of the line receives goods to be transported though marked for a consignee at the other end of the line, and on delivery of the goods takes pay for transportation through, the carrier, who so receives the goods, is bound to carry them, or see that they are carried to their final destination, and is liable for an accidental loss happening in any part of the connected line;" Perley, C. J., delivering the unanimous judgment of the court. In doing so, reference was made to the indefinite manner in which the terms "*special* contract," "*express* contract," "*positive* contract," are used. Thus, in Perkins *v.* The P. S. & P. R. R.,[2] the head-note is: "A railroad company may be bound by *special contract, but not otherwise*, to transport persons or property beyond the line of their own road." The New Hampshire court, in commenting upon this, said: "It is to be observed that in this case of Perkins *v.* The Railroad, the

construction being that in the one case, in the absence of exemptions, the carrier has contracted unconditionally to deliver; the other, with conditions inserted, they must control. But if there be a difference, that difference is immaterial here, because both parties claim a contract." But we think we have shown that there is, in the actual holding in the English cases, and in those in this country (with a few insignificant exceptions, such as the badly decided cases in Connecticut) which are generally assumed to be decided adversely to the English decisions, really less difference even, than the slight difference assumed by the South Carolina court to exist between them. In both countries the question simply is as to what is the particular contract, expressed or implied, in the case. The mistake that is made by so many of the courts and writers in this country, is in assuming that because it has been very naturally held in England that where a shipper delivers goods to a railway, marked for a specific destination, he implies thereby that he expects them to be carried there; so, the carrier receiving them for carriage likewise implies that he, in so receiving them, undertakes to carry them to their marked destination whether on or off his own immediate portion of a connecting line; and more particularly so when there is out one through rate, paid or to be paid, charged for such through carriage; that such implication is conclusive, unless there is a "special" contract or "express" contract to the contrary. But the English cases hold no such doctrine. The mere implication is *primâ facie* only, — not conclusive. It is an inference that the jury is warranted in drawing from the facts. But it may be rebutted, not by special or express contract only; but, as any other mere *primâ facie* implication may ordinarily be rebutted, by sufficient proof of usage, or by any other facts or circumstances which overcome or repel the implication which would arise from the otherwise uncontrolled and uncontroverted fact. That, in a word, there is nothing at all singular in a railway contract, but the ordinary rules of construction apply to it as to any other contract.

[1] 9 N. H. 339.

[2] 47 Me. 573, examined by us *supra*, p. 136.

plaintiff had judgment on the ground of a special contract; from which the negative inference is drawn that the plaintiff could not recover otherwise than by a special contract. This cannot be regarded as quite equivalent to a direct decision on the point; for if the point was raised in the case, it certainly did not require the court to determine whether a special contract was necessary to charge the defendants, and besides there is reason to think that the term 'express contract' could hardly have been used in its strict sense to signify a contract in the form of a direct promise or undertaking in language, oral or written, proper to show a positive agreement; since the judge who delivered the opinion of the court speaks of a case where the carriers would be liable on the ground that they 'held themselves out as common carriers to that place;' in which case, as I understand it, the contract would not be express, in the strict or usual sense of the term, but implied from the conduct of the party. And the same learned judge also says: 'It is of great public convenience, if not absolute necessity, that several companies should combine their operations, and thus transport passengers and merchandise by a mutual arrangement over all their lines, upon one contract, for one price. In such cases each is held liable for the whole distance.' Instances are to be met with in other books, of a similar latitude in the use of the term 'special contract,' as in 2 Redf. on Railways, 104, where the term 'special contract' is used, but the example given is of a contract implied from certain facts. For these reasons we are not inclined to regard Perkins *v.* The Railroad as a direct and final decision by the courts in Maine of the question raised in the present case." And again: "In Darling *v.* The Boston & Worcester R. R.,[1] it was decided that 'if an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route shall be delivered by each to the next succeeding company, and each company receiving them shall pay to its predecessor the amount already due for carriage, and the last one collect the whole from the consignee, a reception of such goods by the last company and payment by it of the charges of its predecessors will not render it liable for an injury done to the goods before it received them.' From this case the general rule has been deduced in Massachusetts, that a carrier is not liable for loss beyond his own line without a *positive agreement* to be so liable; though some of the discussion in Darling *v.* The Railroad seems hardly consistent with such a rule, for the learned judge who delivered the opinion says: 'The usage as to the manner of doing the business enters into the contract as part of it, in the

[1] 11 Allen, 295.

absence of an express contract. But the convenience of commerce makes it highly useful to send goods to distant places which can be reached only by independent lines of transportation. It is important that this business should be accommodated; and this may be done by express agreement or *established usage*. It is frequently done in this country by arrangements made by the proprietors of connecting lines with each other; and this is much better than to leave any important matter of this kind to be settled by usage. When such arrangements are made, the liability of each line is to be determined by a fair construction of their terms.' That is to say, usage enters into the contract on which the goods are carried for the owner; but when the business is done on the connected line by an agreement among the parties to it, the liability of the different parties to the owner for the transportation of his goods is to be determined by a fair construction of the terms of the agreement among the parties to the connecting line; and the contract on which the goods are carried is inferred from usage, or from the arrangements among the parties to the connected line, and in such case does not depend on any positive agreement between the owner of the goods and any of the carriers." [1]

[1] We here set out the remainder of this valuable judgment in full. Perley, C. J., goes on to say: "We have been furnished with a manuscript copy of the opinion in Goss *v.* The New York, Providence & Boston Railroad, decided in Suffolk, March, 1868, since reported (99 Mass. 220), in which, on facts that we cannot distinguish from the present, the court held that the point was settled by the prior decisions in Massachusetts, especially by the case of Darling *v.* The Railroad, and declined to discuss the general question further. And in the case of Burroughs *v.* The Norwich & Worcester Railroad, decided in September, 1868, we have also been furnished with the opinion of the court holding the law to be well settled in Massachusetts that a corporation established for the transportation of goods over a line between certain points, and receiving goods directed to a more distant point, is not responsible beyond the end of its own line, unless it makes a positive agreement extending its liability. And this rule, if a newspaper report can be trusted, was lately applied in Pendergast *v.* The Adams Express Company, by the same court to the case of an express company that gives a receipt for money directed to a place beyond the line of the company that gives the receipt. It has been said that the English rule on this subject has not been generally adopted in this country. A review, however, of the American cases shows but too plainly that if our courts have differed from the English, they are far from agreeing among themselves in any principle or doctrine that can be called the American rule. There is not only much confusion, but no little conflict in the American authorities. A large proportion of them are not directly in point for the present case, which must be decided on the facts found by agreement of the parties. The following are the facts and circumstances from which the contract between these parties must be inferred: —

"The three corporations were engaged as common carriers in the transportation of goods in a connected line between Nashua and New York, under an agreement among the parties to the connected line.

"In the present instance, and generally under the agreement, one price was paid for transportation through.

"The freight money was divided among the parties to the connected line in proportions fixed by their agreement.

"The goods were received by the defendants for transportation on the connected line marked for New York.

"The legal inference from the general statement of the agreement is that the parties to the continuous line were bound by

In Barter *v.* Wheeler,[1] it was held that when two or more railroads are associated together, and form a continuous line for the

their mutual contract to take from each other and carry through, goods so marked that might be received by any one of them.

"The price for transportation to New York was paid to the defendants when they received the goods. The American authorities are comparatively few, which hold that when all these circumstances occur, the carrier who receives the goods is not bound, by an implied agreement, to carry them, or see that they are carried, over the connected line to their final destination. I do not find that the decisions in any of the States sustain this defence, except in Connecticut, Maine, and Massachusetts.

"With regard to the cases in Connecticut, it cannot imply any want of the respect due to the courts of that State, if I say that for two reasons their cases on this point are not entitled to all the deference that is paid to their decisions on other subjects. In the first place, it is held there that railroad corporations have no corporate authority to contract for the transportation of goods or passengers beyond their own lines; a doctrine rejected everywhere else. If it were admitted that railroads had the power to make such contracts, it does not appear that the courts in Connecticut would have decided that the plaintiff in a case like this would not be entitled to recover. Indeed it would seem from the opinion of the court as delivered by Ellsworth, J., in Elmore *v.* The Nantucket Railroad, 23 Conn. 457, that in Connecticut, these defendants would be held liable if their power to contract were conceded. He says 'No money was paid, or agreed to be paid, for conveying the leather to any specific place. There was no evidence or claim that there was any connection between the defendants and the steamer, except in the customary way of forwarding freight. They delivered the goods to each other from time to time as they were marked for transportation, no matter to what place, whether to New York, California, Europe, or Asia. It is obvious that when the different carriers throughout the route are connected in business by some joint understanding or partnership, there can be no difficulty in case of a loss which happens on any part of the line; but the question arises, when this is not the case, what is the law then?' From this it seems to me that we are warranted in supposing if the defendants had power to contract, and the facts had been such as are found in the present case, the court in Connecticut would have no difficulty in charging the defendants for a loss happening in any part of the line. Then again, these decisions in Connecticut were by three judges against two; Waite, then chief-justice, and Hinman, who has since filled that place. The reasons for holding the defendants liable in Elmore *v.* The Railroad, are very ably and forcibly stated by Waite, C. J., in his dissenting opinion. Such dissent, it is evident, leaves the authority of the cases so much reduced, that they cannot be entitled to great weight out of the jurisdiction in which they were decided.

"The single case of Perkins *v.* The P. S. & P. Railroad, for reasons before suggested, we cannot consider as a final settlement of the question in Maine. But in Massachusetts, the court in a series of decisions have established the rule that a carrier, though associated with others in a connected line of transportation, is not liable for a loss happening beyond his own line without a positive agreement to that effect; and this rule is applied to the baggage of passengers, and the undertaking of express companies that receive goods for transportation beyond their own lines. The fact that, notwithstanding the earlier decisions, suits have continued to be brought in that Commonwealth against parties that have received goods to be transported on continuous lines for losses happening beyond their own lines, might seem to suggest a suspicion that the profession and the public had not readily acquiesced in the rule as there laid down; but the court have adhered firmly to the rule, and in some of the later cases have apparently declined to enter on the discussion of the question, treating it as finally settled; and we must, therefore, consider the high authority of that court as against the right of the plaintiffs to recover in this action. So far, however, as that court may be understood to have established the rule that to bind a railway for transportation beyond its own line, there must be an express and positive agreement between the railroad and the owner of the goods, and that such an undertaking is not to be implied from facts such as are found in this case, the current of American authority, to say nothing of the English, appears to be strong the other way. Excepting the cases in Connecticut and Maine, which, when examined, do not, I think, give the Massachusetts doctrine any very strong support, the authorities in other States,

[1] 49 N. H. 9, 25.

transportation of freight and passengers, giving to each the right to sell tickets and receive freight, and bargain for its transporta-

though they differ much in other particulars, generally agree in this, that where, as in the present case, there is a continuous line of different carriers united by an agreement under which they carry goods through the connected line for one price, which they divide among themselves in proportions fixed in their agreement, if one of the parties receiving goods to be transported on the continuous line, marked for any place in it, and on receiving the goods takes pay for transporting them to that place, the party so receiving the goods and the pay for transportation is *primâ facie* bound by an implied agreement to carry the goods, or see that they are carried, to the place for which they are marked, and is liable for a loss happening on any part of the connected line.

"If the case were to be considered on authority only, we should feel bound to decide for the plaintiffs, inasmuch as we find the weight of authority to preponderate heavily in their favor, and taking general principles and reasons of convenience and public policy for our guide, we are led to the same conclusion.

"In the view which the plaintiffs ask us to take of this case, when the goods were received by the defendants, marked for transportation to New York, and the price paid to the defendants for transportation through on the continuous line, the plaintiffs made one contract with the defendants, by which the defendants agreed, either as joint carriers with the other associate parties, or as undertaking for them to carry the goods through for the price paid, as goods were carried in the usual course of the business on that line. In that view, the plaintiffs would have nothing further to do in the matter. Everything else was provided for by the agreement among the associated carriers; for by their agreement, the defendants were bound to transport and the successive carriers would be bound to take and carry the goods from each other to their final destination. The price through was paid, and belonged to the different carriers in proportions fixed by their agreement, and this theory would agree exactly with the facts; for the plaintiffs in fact made but one agreement with one party to have the goods carried for one price to New York. No further stipulation or direction on the part of the plaintiffs was necessary, and none was ever in fact given by owners of goods who put them in the course of transportation, as these were put, in the continuous line.

"According to the defendants' theory of the case, when the plaintiffs delivered the goods marked for New York, and the defendants received them and took pay for transportation through, no contract was made with any party to carry the goods through; but the contract then made by the defendants was to carry the goods to the next carriers on the connected line with the surplus money, and as agents of the plaintiffs, make a contract if they could with the next carriers to take the goods and the money, and carry them on in the same way through successive agencies for the plaintiff to their final destination. If these agents should consent to act for the plaintiffs, and be able to negotiate bargains with the other carriers for transportation through, the goods would go to New York as was intended; but they would go under three separate contracts made at different times through this imaginary agency with three different and independent parties.

"The first objection to the defendants' theory of this transaction is that it is contrary to the fact. The owner of goods in a case like this does not in fact appoint or employ the successive carriers in the continuous line as his agents to hold his money for him, and as his agents carry it forward and contract in his behalf with the other roads for further transportation. He makes but one contract for the price; he pays the price, and the money he has paid does not belong to him, but to the associated carriers in proportions fixed by their agreement. He does not inquire, nor is he interested to know, how they divide the money. The contract is entire and complete when he pays the price for transportation through, and everything to be done afterwards is regulated by the standing agreement among the associated carriers. He has no control over them as his agents; he does not and cannot intermeddle with the manner in which they do the business or dispose of the money that he has paid for the carriage of his goods. Let us see what are some of the consequences that would follow, if both parties in a case like this should act on the defendants' view of their legal rights. Suppose in this case the goods had been carried through to New York, and the defendants had not paid to the next carriers the proportion of the freight-money which belonged to the other carriers; and then suppose that the Norwich & Worcester Railroad should sue the plaintiffs for carrying the goods over their road. It would avail the plaintiffs nothing to say that they had paid the freight through

tion over the whole line, and to receive the price of said tickets and transportations, the same to be divided between them at

when the goods were received at this end of the route. The ready answer would be: 'To be sure, you put money into the hands of your agents, the Worcester & Nashua Railroad, to pay us, but they neglected their duty; your money is still in their hands, and we are not paid.' It is, however, quite clear, that the money received by the defendants for transportation through on the connected line would be held by them for all the parties to the line; they would be bound to account for it under their agreement, as one partner accounts with his fellows for money received on partnership account. Then if the plaintiffs should undertake to pay the different carriers, how are they to know the share of each? The proportions of the freight money belonging to them respectively are regulated by a private agreement of which the plaintiffs knew nothing, and of which in the way the business is actually conducted they have no need to be informed. If the plaintiffs had proposed, when they delivered the goods, to pay the Worcester & Nashua road their proportion of the freight money, and afterward to pay the other carriers their respective shares, they probably would have found nobody to tell them what the different shares were, or to receive the goods to be carried on such terms. In truth the connected line transacts business as one joint concern, and the business cannot be transacted otherwise, with convenience either to the carriers or the owners of the goods. Then if we look to the remedy of the associated carriers for the recovery of the freight money, each, on the theory of the defendants, must bring a separate suit on the separate contract for his proportion of the money. We have had occasion to learn from the facts stated in another case now pending before us, that there is a connected line consisting of six or seven different railways, extending from Ogdensburg in New York through Vermont and New Hampshire to Boston in Massachusetts, in which one price is paid for transportation through, and the money divided by a standing agreement as in this case. If goods are carried through on this route, and there are six or seven different contracts, one with each road, then each road must bring a separate action for its share of the freight money. If it should be said that the remedy of the roads is to retain the goods at the end of the route till the whole price for transportation through is paid, this, in the first place, would show that these roads are so combined that for their own purposes they are a unit, while they insist that they are wholly separate and independent when the owner seeks redress for the loss of his goods. And then again, if the roads act separately and are not jointly interested in the business of the connected line, when one of the roads parts with the possession of goods by delivery to another, it loses its lien for the freight money, and cannot transfer it to another independent carrier. Angell on Carriers, 357, 359, 609. This is not at all like a maritime lien, when a voyage is broken up and the cargo is put on board another vessel to be carried to the port of destination. There the lien on the cargo for the whole freight is transferred to the second vessel, which completes the transportation under one contract.

"The use of steam in carrying goods and passengers has produced a great revolution in the whole business. The amount and importance of it have of late years increased and are every day increasing. The large business between different parts of the country is done, as in this case, by parties who are associated in long continuous lines, receiving one fare through, and dividing it among themselves by mutual agreement. They act together for all practical purposes, so far as their own interests are concerned, as one united and joint association. In managing and controlling the business on their lines they have all the advantages that could be derived from a legal partnership. They make such an arrangement among themselves as they see fit for sharing the losses, as they do the profits, that happen in any part of their route. If by their agreement each party to the connected line is to make good the losses that happen in his part of the route, the associated carriers, and not the owner of the goods, have the means of ascertaining where the losses have happened. And if this cannot be known, there is nothing unreasonable or inconvenient in their sharing the loss, as in case of a legal partnership, in proportion to their respective interests in the whole route.

"They undertake the business of common carrier, and must be understood to assume the legal liabilities of that business. They transact the business under a change of circumstances; but the principles and the general policy of the common law, which, as an elementary maxim, holds the common carrier liable for all accidental losses, must be applied to these new methods of transacting the same business; and there is certainly

periodical settlements; the sale of such tickets, and the obtaining of such freight, being for the common benefit of all the

nothing in the present condition of the business, which calls for any relaxation of the old rule. The great value of commodities transported over these connected lines; the increased risk of loss and damage from the immense distances over which they carry goods; the fact that where goods are once intrusted to carriers on these long routes they are placed beyond all control and supervision of the owner, are cogent reasons for holding those who associate in these connected lines, to a rule that shall give effectual and convenient remedy to the owner, whose goods have been lost or damaged in any part of the line. Any rule, which should have the effect to defeat or embarrass the owner's remedy would be in direct conflict with the principles and whole policy of the common law.

"What then is the situation of the owner, whose goods have been damaged or lost on a continuous line of three or any larger number of associated carriers, if he can look only to the ca rier, on whose part of the route the damage may have happened? In the first place, he must set about learning where his loss happened. This would often be difficult, and sometimes quite impossible. Suppose an invoice of flour shipped in good order at Ogdensburg were found on arrival at Boston to have been damaged somewhere on the route; or suppose a trunk checked at Boston for Chicago was broken open and plundered before it reached Chicago, what would the owner's chance be worth of finding out in what particular part of the route the damage happened? He would have no means of learning himself; and he would not, unless of a very confiding disposition, rely on any very zealous aid in his search from the different carriers associated in the connected line. And if he should have the luck to make the discovery, he might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man, and induce him to sit down patiently under his loss, rather than incur the expense and risk of pressing his legal remedy under the rule set up by these defendants. The forlorn condition of the owner in such a case is put in a strong light by Waite, C. J., in his dissenting opinion, Elmore *v.* The Nantucket Railway, 23 Conn. 478, where he says: 'A merchant residing in Cleveland, Toledo, or Chicago, purchases goods in the city of New York, which he wishes to send to his place of business. He enters into a contract with a railroad company for their transportation, not to any given point on the route, but for the whole distance. He delivers the goods to the company, and they are taken and locked up in freight cars. He does not accompany them, and often sees and hears nothing more of them until they are delivered to him at their place of destination. The cars in which they are placed are often run over roads belonging to different companies, to save trouble and expense of change of cars. If the goods are lost or damaged on the route, he ordinarily has no means of determining where or in whose custody the injury occurred. The trouble and expense of ascertaining that fact in many cases would amount to more than the whole damage. As a prudent, cautious man, he would be unwilling to intrust his goods to the custody of others, unless he could find some person or company that would be responsible for their safe delivery.' The remarks of Smith, J., 34 New York, 501, before cited, are of the same import, showing the difficulties and embarrassments of the owner, if he can only resort for compensation to the carrier in the connected line, on whose part of the route the damage happened.

"A rule which throws such difficulties in the way of the owner who seeks to recover of common carriers for the loss of his goods, I cannot but regard as a wide departure from the general doctrine of the common law on this subject; and nothing is plainer than the duty of courts to apply the general principles of the common law to the new circumstances which are introduced by changes in the manner of transacting any business. Few things are of greater importance to the whole country than the cheap, convenient, and safe transportation of goods between distant points. Vast sums of money are expended to promote this object. The business is already immense, and constantly increasing. Most of this business is done on connecting lines of railroads and steamboats, and these by continuous lines have a practical monopoly of the business on their respective roads. The owner of goods must intrust them to these associated carriers; they cannot be carried in any other way. Not only those who are engaged directly in carrying and sending goods are interested in this subject; all who produce and all who consume are interested that goods should be carried as cheaply, as conveniently, and as safely as possible. Public policy and the public interest concur with the general

companies, the receipts being divided between them in proportion to the amount of service rendered by each; they stand substantially in the position of partners in such through business, and are jointly liable for losses on any part of the through route. This holding corresponds with that in the Irish cases.[1] This New Hampshire case seems to consider the English cases as holding that in no case will an action lie against an intermediate carrier. But we think it clear that this view is inaccurate. On the point of joint liability, where the relationship is, in effect, that of partners, the Irish cases are professedly founded on the English cases; and, as we have shown, *supra*, p. 81, the English cases hold, that, when there is but one entire contract, an action will only lie, on the contract, against a party to the contract; yet in tort,[2] for a loss caused by negligence, the English cases hold, as was held in New Jersey Steam Nav. Co. *v.* Merchants' Bank,[3] cited in the New Hampshire case, that an action will well lie against the company, independent of contract, for the loss caused by their negligence; thus giving the plaintiff the remedy, at his election, either against the party with whom he contracted, under his contract, or against the party whose negligence caused the loss, for the misfeasance.

In State *v.* Hodge[4] is an elaborate judgment by Doe, J., on the subject of presumptions, as to whether they are of law or of fact. We think that the authorities cited there show that there are presumptions of law and presumptions of fact. The argument, however, rather is that all presumptions are simply presumptions of fact. The authorities there cited do not sustain this position.

maxim of the law that those who transact this great business should be held to a rule which shall give a ready and effectual remedy to the owner whose goods have been lost or damaged in any part of these connected lines of transportation. There is a perplexing diversity of decision on this subject in the different tribunals of this country. For instance, by the law of New York, as we understand it to be established by the construction which the courts have given to their statute, if goods are received in that State for transportation through on a connected line of railroads, the road that receives the goods is liable for loss or damage happening in any part of the connected line, though beyond the limits of the State. Burtis *v.* The Buffalo & State Line R. R., *qua supra*. As has been before mentioned, there is a connected line of six or seven railroads extending from Ogdensburg to Boston. If goods are received by the Ogdensburg Railroad for transportation to Boston, and are lost or damaged on any part of the line, say on the Lowell Railroad, the Ogdensburg Railroad is liable for the loss. But if merchandise is received at Boston by the Lowell Railroad for transportation to Ogdensburg over the same connected line of railroads associated under the same agreement, the owner would be left to find out, if he could, on which of the six or seven connected roads his goods were lost or damaged, and could claim for his loss of that road alone. There would seem to be no remedy for this confusion and conflict of decisions unless the national Legislature can provide one under the power given by the Constitution to regulate commerce. I come to the conclusion that on the case stated the plaintiffs are entitled to recover; and such is the unanimous opinion of the court." Nashua Lock Co. *v.* The Worcester, &c. R. R. Co., 48 N. H. 356 *et seq.*

[1] Stated by us, *supra*, 86 *et seq.*

[2] See *supra*, 88, n.

[3] 6 How. (U. S.) 344.

[4] 50 N. H. 510.

Of course all law is based on fact, but from certain facts a legal presumption may always arise; that is, it is a presumption of law arising from a given state of facts. The question, we think, at least as far as it affects the subject we are considering, is not now practically debatable. Presumptions are divided into presumptions of law, presumptions of fact, and mixed presumptions of law and fact.[1] Our reason for referring to State *v.* Hodge[2] is because the same court, following that case, in Gray *v.* Jackson,[3] Doe, J., again delivering the judgment, treats the whole matter we have been considering simply as one of fact, and not at all, or in any respect as one of law. In order to arrive at this conclusion, there is, as in the previous case, a wholesale distortion of the authorities cited. If, in all of the cases on the subject which arise, whether in England or in the different States of the Union, the question is purely one for the jury, as this last New Hampshire case puts it, then there would soon be a state of inextricable confusion which *would* require immediate legislative remedy. But we think that none of the great number of cases cited on the subject in the New Hampshire case sustain the holding in that case; but the reasonings and conclusions in them all are diametrically opposed to the holding in that case. In all such cases as these, we think the questions are mixed questions of law and fact. In the Connecticut case referred to in the New Hampshire case, the court, on the facts, treated the question involved as being, to some extent, one of law, as on legal grounds[4] they nonsuited the plaintiff; holding, *as a matter of law*, that, on the plaintiff's own showing, there was no case to go to a jury. So, in another prominent case on the subject, Muschamp *v.* Lancaster Ry.,[5] it was clearly a mixed matter of law and fact. For there, not only were there facts which were left to the jury, but Rolfe, B., instructed the jury, as a matter of law, applicable to the facts in that case, that there was legal evidence, in such facts, of the defendants' liability. In this, as a matter of law, he was sustained by the full court. *Ergo*, had he, as a matter of law, instructed the jury in the opposite way, there would have been misdirection, in law, and the verdict would have been set aside. And Doe, J., in the New Hampshire case, while actually quoting the language in the case, seems entirely oblivious of the fact, that the question in Muschamp *v.* Lancaster Ry,[6] came up *exclusively* as a question of law. The rule *nisi*, which was granted in the

[1] See Best on Evid., § 303 *et seq.*
[2] 50 N. H. 510.
[3] 51 N. H. 9.
[4] The majority of the court, as we have seen, *supra*, 139 *et seq.*, differing with *the law* as it is held in England.
[5] 8 M. & W. 421.
[6] *Ibid.*

case, and which was unanimously discharged,[1] was not on the ground of the verdict of the jury being unwarranted by the facts; but on the ground that there had been misdirection by the judge, *as a matter of law*. And the court sustained the law, and the verdict as well; holding that the finding on all the facts was, in the case, thoroughly consistent with the law as laid down in the case by Rolfe, B. And that learned judge, in his judgment, expressly says, "I think the construction *we* are putting on the agreement is *not only consistent with law*, but is the only one consistent with common-sense and the convenience of mankind." It is the province of the courts — "*we*" — to decide questions of law, not issues of fact.

The attempted correction of the reporter's note by Doe, J., in Gray *v.* Jackson[2] would be an entire misstatement of the holding in the Muschamp case. The court held that the law had been laid down by Rolfe, B., without misdirection, and that the verdict of the jury, under such proper direction, was fully sustained by the facts. The finding of the jury was not even attacked, because, as is manifestly evident in the case, if the direction was sound, the additional facts in the case showed the defendants' liability on their implied entire through contract beyond any question, as a matter of law and of fact. The New Hampshire court was palpably wrong in treating as they do the *directions of the judge* merely as *an opinion of the weight of the evidence*. If Rolfe, B.'s, view of the law had been such as was held by the mere majority of the judges in the unsoundly decided Connecticut cases, then, instead of directing the jury as he did, on a matter of law, it would have been his duty to have pursued the course of the Connecticut court, and to have nonsuited the plaintiff.

It is also noteworthy that in the Connecticut case of Elmore *v.* The Naugatuk R. R. Co.,[3] where the judge laid down the law substantially as it has been uniformly decided in England, and the jury, as in England, *found for the plaintiff on the facts;* yet the majority of the Connecticut court set aside the verdict, because they considered[4] that the jury had "acted under erroneous views of *the law;*" the court further saying,[5] relative to their action in New York & N. H. R. R. Co.,[6] that they had then intimated that the recent English cases "*were not law;*" and, "We rejected *the law* of those cases, in their (*sic*) application to passengers, and we are ready to do it in relation to freight." And

[1] And the decision of the court in doing which has since been unanimously sustained, as a matter of law, by all of the English courts in succession.
[2] 51 N. H. at p. 15.
[3] 23 Conn. 457.
[4] See at p. 470.
[5] At p. 474.
[6] 22 Conn. 1.

if the *law* of the Connecticut cases is sound, no case other than Gray *v.* Jackson [1] has ever questioned the correctness of the course of the majority of the court in setting aside the verdict of the jury.

Again, in Webber *v.* Great Western R. Co.,[2] the court held that "there was evidence for the jury *of one contract only, and not two contracts.*" Therefore their verdict was sustained. But had the jury found that there were *two contracts*, and not one, *semble*, their verdict would have been set aside. It is the province of the jury to decide on the facts; and when, on their finding there are facts which, on the law applicable to the case, their verdict can be fairly sustained, it will be; otherwise, it will be set aside. This is so simply and merely elementary, that it is strange to find an elaborate judgment by the New Hampshire court endeavoring to prove the contrary, and attempting to do so too by a complete perversion of the cases. Evidently Parker, C. J., was not a member of the New Hampshire court when Gray *v.* Jackson [3] was decided.

The case of The Nashua Lock Co. *v.* The Worcester, &c. R. R. Co.,[4] in the same court, which we have stated very fully,[5] is much better decided. There [6] the question is put, as it properly is, as one of mixed law and fact; a "legal inference," to be inferred from the facts and circumstances; or, as it is put in Railroad Co. *v.* Pratt,[7] "the weight, the force, or the degree of evidence is not before us *if there was competent evidence* on which the jury *might lawfully find* the existence of the contract alleged. . . . Both the authority of Graves, the station agent, to make the contract, and the evidence of Pratt and others of the making of the contract, were *questions of fact for the consideration of the jury.* If the jury have found in the plaintiff's favor on these points, *upon evidence legally sufficient to justify it*, this court cannot interfere with their findings."

Gray *v.* Jackson [8] is not only not sustained by the English and American authorities generally, but it is opposed to the better decided cases in the New Hampshire court itself. Thus, again, in Nashua Lock Co. *v.* The Worcester, &c. R. R. Co.,[9] Perley, C. J., in delivering the unanimous judgment of the New Hampshire court condemning such a "rule" of law as was held in the Connecticut cases, says: "A rule which throws such difficulties in the way of the owner who seeks to recover of common carriers

[1] 51 N. H. at p. 29.
[2] 3 H. & C. 771, as quoted in Gray *v.* Jackson, at p. 22.
[3] 51 N. H. 9.
[4] 48 N. H. 339.
[5] *Supra*, p. 199, *et seq.*
[6] At p. 357.
[7] 22 Wall. at p. 131.
[8] 51 N. H. 9.
[9] 48 N. H. at p. 363.

for the loss of his goods, I cannot but regard as a wide departure from *the general doctrine of the common law on this subject;* and nothing is plainer than the duty of courts to apply *the general principles of the common law* to the new circumstances which are introduced by changes in the manner of transacting any business."

Common law is simply common sense; "the very perfection of reason;" and we think the doctrine established by the English decisions, and by the great mass of the cases in this country which are decided in general harmony with them, is the result of sound, sensible, *legal* construction of the "special contracts," whether express or implied, in such cases. And in Gray *v.* Jackson,[1] notwithstanding the labored argument in the case to show that, in this class of cases, the question is altogether a question of fact for the jury, and, therefore, that the particular case is absolutely concluded by the finding of the jury; the court, after all, admit that this is wrong, and that the reference to Muschamp's Case by Judge Redfield, of the question being "chiefly a matter of fact," takes "into account the idea that the question was, *of course*, subject *to the general and elementary rules of law upon which all contracts rest.*" Precisely so. If, on any view of the facts and circumstances which the jury can reasonably take, their finding legally can be sustained, it will be; otherwise, it will be reversed.

In Gray *v.* Jackson,[2] a package was delivered for conveyance to Reading, Massachusetts, which was received by the defendants for conveyance, the plaintiff paying and the defendants receiving one entire sum for the entire conveyance. We think this, *in law*, as much implies a contract by the defendants, carriers, to carry the package to Reading, as the sale of a parcel of goods for a specific price implies, in law, the claim, by the vendor, of a right to sell the entire parcel. We think the presumption of law is as clear in the one case as in the other. The New Hampshire court in Gray *v.* Jackson[3] held otherwise; ostensibly on the ground that principles of law have nothing to do with such a case; but that (in this class of cases, at least) the question is entirely one for the jury, and let them find as they may their finding is conclusive.

If this were *law*, there would be no legal "rule" at all applicable to such cases; and the numerous references by the courts and text-writers in this country to the English rule and the American rule, with reference to the assumed differences between the English and many of the American cases on the principles of law

[1] 51 N. H. at p. 25.
[2] 51 N. H. 9.
[3] *Ibid.*

governing them, would be, of itself, altogether absurd. We think, however, it is obvious, that not only on the facts in Gray *v.* Jackson [1] is the decision itself not sustained by the previous New Hampshire cases, and by the almost solid mass of the other cases on the subject, whether in England or the United States; but that it is equally obvious, on principle and authority, that the ground of the decision, that the question involved is not one of law at all, is entirely unfounded. We think the evidence in that case does show that a *legal contract* was entered into, and that there is not, in the case, *as a matter of law*, a scintilla of evidence showing that any other contract was entered into than that of carrying the parcel to Reading, for the carriage of which a specific agreed price was paid and received. And we think, further, as a clear principle of law, from the facts in that case, that if such agreed price had not been paid, the defendants, on the carriage of the parcel to Reading, could unquestionably have sustained an action against the plaintiff for the agreed through price of the carriage to Reading on their one entire contract, which was a contract for such carriage to Reading, for such price, or it was nothing.

We think *the law* of The Nashua Lock Co. *v.* The Worcester & Nashua R. R. Co.[2] much sounder than that of Gray *v.* Jackson,[3] which latter case, we think, in assuming that there is no law whatever in the matter, itself undertakes to establish, as a principle of law, that which in effect it declares is not a principle of law at all, but simply a matter of fact.[4]

In McCarthy *v.* Terre Haute, &c. R. R. Co.,[5] the question, as usual, is treated as a mixed matter of law and fact, and, in this case, the verdict of the jury was set aside, the court seeing "no evidence in the case from which a fair inference of a contract to carry beyond Indianapolis can be drawn." In this case, as in so many of the cases, the law as decided in England is misstated as being one, in effect, exclusively in law, and not of fact at all, — "that the first carrier is liable as a carrier, and is exclusively liable to the end of his route, though the goods are carried to their destination over connecting lines in which the first carrier is not interested." This, on the one hand, is as bad as the decision in Gray *v.* Jackson [6] is, on the other. The English cases hold that the carrier may make himself liable *by a contract*, express or implied, for the carriage beyond his own immediate route, and whether he do so or not is a question of fact for the jury, under the proper instructions of the court; and, as usual, if on the find-

[1] 51 N. H. 9.
[2] 48 N. H. 339.
[3] 51 N. H. 9.
[4] See this very clearly at pp. 38 and 39. The case, we think, is very clearly self-destructive.
[5] 9 Mo. Ap. 159.
[6] 51 N. H. 9.

ing of the jury, there is evidence that will sustain their finding and the instructions of the court, the verdict will be sustained. Otherwise, it will be set aside. The question is, therefore, one of those which is usually designated as a mixed one of law and fact. And as hold the English cases, so, as we have exhaustively shown, in this elaborate examination of the question, also hold the American. As in England, so in this country, *the carrier may contract, expressly or impliedly*, for the conveyance of goods or of passengers beyond his own immediate route, and whether he do so or not is here, as there, a question of the construction of the particular contract in the case. True, Rolfe, B., did, in effect, state, that in the receipt of goods for carriage, marked for a specified destination, there was implied in that fact alone, *primâ facie*, that from which a jury would be warranted in inferring a contract to carry them to said designated point. But the inference from that fact alone, as Lord Abinger stated, was simply *primâ facie;* not conclusive. In the case itself there was an agreed through rate for the whole distance, and other strong facts, to which we have made repeated reference in this investigation of the subject, to strengthen the inference resulting from the one fact that the goods were certainly intended to be carried to the place for which they were marked. On the other hand this inference might have been destroyed, under facts from which, expressly or impliedly, a different contract might be shown. Practically, as a matter of fact, the one fact of the marking of the goods, as an unsupported inference from which a contract is to be implied, never stands alone. When the goods are received by a carrier, they are received for carriage. When received for carriage, *primâ facie* they are received to be carried to the place for which they are "booked," or to which they are marked. If the carrier so receiving them for carriage, under a contract to carry them, by himself or his agents, to the place for which they are marked, booked, or way-billed (either of these last two adding to or taking from the inference from the marking), charges a one through price for such carriage to the ultimate designated place, where they are there (as in Muschamp *v.* Lancaster Ry.)[1] to be delivered, by the one contracting carrier or his agent, to the shipper, or the consignee; then, there being no express contract otherwise in the matter, and there being no other facts in the case to rebut the inference resulting from all of these facts, — and they were all in the Muschamp Case, as in the concurrent New York case, — the court, we take it, under the general American as well as under all the English decisions, would be

[1] 8 M. & W. 421.

legally justified in instructing the jury, that, if they so found these facts, as stated, they would be warranted in inferring a one entire contract, by the contracting carrier, to carry the goods he had received for carriage, by himself or his agents, to the specified place to and for which such goods had been marked, booked, way-billed, freight-paid, and to be delivered. And, we think, on the jury so finding, in accordance with all these facts, the directions of the judge on the trial and the finding of the jury would be sustained by the English or American court to which the question of the instructions and finding might, as a matter of law, be submitted for their decision. If, on the other hand, notwithstanding the marking, the goods were booked or way-billed for only a part of the distance, there to be delivered to another carrier, for independent carriage; or freight were only paid and received for the carriage for a part of the distance, or there were any other circumstances from which a more limited carriage might be presumed, than to the point for which the goods were marked, as the place of their ultimate destination; then, as in so many of the cases, as we have shown, both English and American, the *primâ facie* inference resulting from the marking would be rebutted, and the contract for a more limited carriage than the entire through distance would be implied.

This, we think, is the conclusion of the whole matter, and it is equally the "rule" *of law* in the United States as in England. Practically, we repeat, the mere marking alone can scarcely exist in any case; and, therefore, undue stress has been laid on the implication resulting from that fact alone. Virtually, in none of the cases in England or here, was not the implication from that fact strengthened or weakened by the other facts in the case:

"While a railroad company cannot be compelled to transport to a point beyond its own line, it is well settled that it may lawfully contract to carry persons and property over its own and other lines to a destination beyond its own route; and when such a contract is made, it assumes all the obligations of a carrier over the connecting lines as well as its own. In such cases the connecting carriers engaged in completing the carriage are deemed to be the agents of the first carrier, for whose negligence and default the contracting carrier becomes liable. . . . Where a railroad company sells a through ticket for a single fare over its own and other roads, and checks the baggage of the passenger over the entire route, more is implied, it seems to us, than the mere acceptance of the property marked for a destination beyond the terminus of its own line. The sale of a through ticket and the checking of the baggage for the whole distance, is some evidence

of an undertaking to carry the passenger and baggage to the end of the journey. The contract need not be an express one, but may arise by implication and may be established by circumstances, the same as other contracts."[1] This language is equally applicable to Muschamp *v.* Lancaster Ry.,[2] as to the Kansas case, and establishes, in effect, the same and not a different principle.[3]

Finally, to sum up: It is competent for a railway company to contract to carry goods beyond their own immediate route, and they very frequently do so contract. Assuming that, with such power, so frequently exercised by them, they make an express written contract to carry goods for a specified destination, for one through rate of freight, that clearly is a contract which can be enforced against them, whether, which is clearly immaterial in the case of such an express written contract, the specified destination be at a point on their own immediate line of railway or not. Suppose, then, that, instead of such an express written contract, they receive goods for carriage, marked for a specified destination, fix a specific through rate for the entire distance, to be paid by the consignee at the ultimate designated point to which the goods are to be carried, and where the consignee is to be present to receive the goods and pay the freight; if that designated point is on their own immediate line, does it not imply a contract to carry and deliver the goods there? Clearly so. Then, with all these ingredients, as above named, if the point is beyond their own immediate line, is there not a similar implication? We can see no principle of reasoning by which any other conclusion can be reached, than

[1] The Atchison, &c. R. R. Co. *v.* Roach, 35 Kan. 740, 743.

[2] 8 M. & W. 421.

[3] For additional cases, which might be almost indefinitely added to, see Baltimore & Ohio R. R. Co. *v.* Campbell, 36 Ohio St. 647, 658; Peet *v.* Chicago & N. W. Ry. Co., 19 Wis. 118; Grover & Baker Sewing Machine Co. *v.* Missouri Pacific Ry. Co., 70 Mo. 672; Chouteau *v.* Leech, 18 Pa. 224; The Baltimore & Phila. St. Co. *v.* Brown, 54 Pa. 77; Hill Manuf. Co. *v.* Boston & Lowell R. R. Corp., 104 Mass. 122; McGregor *v.* Kilgore, 6 Ohio, 359; Check *v.* The Little Miami R. R. Co., 7 Am. Law Reg. 427; The Cincinnati, &c. R. R. Co. *v.* Pontius, 19 Ohio St. 221; The Baltimore & Ohio R. R. Co. *v.* Green, 25 Md. 72; Cincinnati, &c. R. R. Co. *v.* Spratt, 2 Duv. (Ky.) 4; Bryan *v.* Memphis, &c. R. R. Co., 11 Bush, 597; Wheeler *v.* San Francisco & Ala. R. R. Co., 31 Cal. 46; Pereira *v.* Central Pacific R. R. Co., 66 Cal. 92; The Evansville, &c. R. R. Co. *v.* Marsh, 57 Ind. 505; Detroit & Bay City Ry. Co. *v.* McKenzie, 43 Mich. 609; Candee *v.* The Pennsylvania R. R. Co. 21 Wis. 582; Schneider *v.* Evans, 25 Wis. 241; Wahl *v.* Holt, 26 Wis. 703; Mosher *v.* The Southern Express Co., 38 Ga. 37; Southern Express Co. *v.* Shea, *Ib.* 519; Cohen *v.* The Southern Express Co., 45 Ga. 148; Hawley *v.* Screeven, 62 Ga. 347; Central Railroad *v.* Combs, 70 Ga. 533; Southwestern Railroad *v.* Thornton, 71 Ga. 61; Little *v.* Semple, 8 Mo. 99; Carr *v.* Steamboat Michigan, 27 Mo. 196; Coates *v.* The United States Express Co., 45 Mo. 238; Halliday *v.* The St. Louis, &c. Ry. Co., 74 Mo. 159; Wyman *v.* Chicago & Alton R. R. Co., 4 Mo. App. 35; Mallory *v.* Burrett, 1 E. D. Smith (N. Y.), 234; Schroeder *v.* The Hudson River R. R. Co., 5 Duer, 55; Simmons *v.* Law, 8 Bosw. 213; Quimby *v.* Vanderbilt, 17 N. Y. 306; Ladue *v.* Griffith, 25 N. Y. 364; Berg *v.* The Narragansett Steamboat Co., 5 Daly, 394.

that there is. All of the assumed ingredients, then, are contained in Muschamp *v.* Lancaster Ry.,[1] a simple case which has been more generally misunderstood, misstated, and distorted than any other case with which we have met.

There was in that case not only the implication of a one through contract arising from the receipt of goods for carriage, marked for a specified place, without any implication of the contract for carriage being for any other terminus than that expressly designated by the address of the goods; but there was in it all the other important facts we have named above, from which a one entire through contract was to be implied. And yet Muschamp *v.* Lancaster Ry. is the one special case which has met with such wholesale ill-founded criticism and condemnation in numerous cases which have been decided in precisely the same way as that badly-criticised case itself.

[1] 8 M. & W. 421.

BOOK IV.

STATUTE OF FRAUDS.

Introductory.

The fourth and seventeenth sections of the Statute of Frauds[1] relate to Sales, and are as follows; —

"IV. No action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise, to answer for the debt, default, or miscarriage of another person; (3) or to charge any portion upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

"XVII. No contract for the sale of any goods, wares, and merchandise, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

This act was amended by 9 Geo. 4, c. 14, known as "Lord Tenterden's Act," the seventh section of which, after reciting the above act and a similar act passed in Ireland, further recites, "And whereas it has been held that the said recited enactments do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied; and it is expedient to extend the said enactments to such executory contracts;" and enacts, "That the said enact-

[1] 29 Car. 2, c. 3.

ments shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." [1]

[1] "It is now well settled that the 17th section of the statute of frauds, 29 Car. 2, c. 3, and the 7th section of Lord Tenterden's Act, 9 Geo. 4, c. 14, are to be read together. Now, the last-mentioned enactment provides that the 17th section of the former act shall extend to all contracts for the sale of goods of the *value* of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, etc. The effect of that enactment, therefore, is to substitute 'value' for 'price' in the former statute, and to adopt an uniform rule in all cases. The 17th section of the statute of frauds must consequently now be read thus: 'No contract for the sale of any goods, wares, and merchandises, of the value of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.'" *Per* Jervis, C. J., in Harman *v.* Reeve, 18 C. B. 587, 595. In Scott *v.* The Eastern Counties Ry. Co., 12 M. & W. 33, it was also held that these two statutes must be construed as incorporated together, and that, therefore, an order for goods made and for others to be made forms one entire contract, and the acceptance of the former goods will take the case out of the statutes as regards the latter also. "If I make a contract for goods already made, and goods to be made, and I accept the goods made, it shows that I made the contract, which is what the act means. The transaction constituted but one contract. There is no distinction between this case and that of a party who goes into a shop and buys fifty different articles at the same time. It is clear that such a person does not make fifty different contracts. If a man enters into an entire agreement for goods made, and for others to be made, his accepting part of the goods made is evidence of his having entered into the agreement. That is the true object and meaning of the statute. The articles bargained to be made are treated for this purpose as goods actually made, although they are not in existence at the time of the agreement." *Per* Alderson, B. *Ibid.* 36, 38. For cases before the passage of 9 Geo. 4, which led to the passage of that act, see Towers *v.* Osborne, 1 Str. 506; Clayton *v.* Andrews, 4 Burr. 2101; Groves *v.* Buck, 3 M. & S. 178; Rondeau *v.* Wyatt, 2 H. Bl. 63; Garbutt *v.* Watson, 5 B. & Ald. 613. Where a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole, within section 17 of the statute. *Semble*, that if the purchaser of goods has used (in the opinion of the jury) more of them than was necessary for experiments, that does not amount to an acceptance within the statute. Elliott *v.* Thomas, 3 M. & W. 170. In Street *v.* Blay, 2 B. & Ad. 463, Lord Tenterden says, in delivering the judgment of the court: "Whatever may be the right of the purchaser to return a warranted article in an ordinary case, there is no authority to show that he may return it where the purchaser has done more than was consistent with the purpose of trial." A. went to the shop of B., linen-drapers, and contracted for the purchase of various articles, each of which was under the value of £10, but the whole amounted to £70. A separate price for each article was agreed upon. Some were marked by A. with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them. It was held that this was all one contract, and therefore within section 17 of the statute, but that there was no delivery and acceptance of any of the goods so as to take the case out of the operation of that section. Baldey *v.* Parker, 2 B. & C. 37. In Hodgson *v.* Le Bret, 1 Camp. 233, it was held by Lord Ellenborough that if the purchaser of goods at the time of the sale write his name upon a particular article, with intent to denote that he has purchased it, and to appropriate it to his own use, this is enough to take the sale, as to the article written upon, out of the statute, but not as to other articles bought at the same time. It is difficult to see upon

what ground this could be held, there being no "actual receipt" of any part of the goods, nor any note or memorandum of the contract even as to the article upon which the purchaser had written his name. The case is overruled by Baldey *v.* Parker, 2 B. & C. 37. See Elliott *v.* Thomas, 3 M. & W. 177, *per* Parke, B. If there had been the acceptance and actual receipt, in Hodgson *v.* Le Bret, 1 Camp. 233, of any of the articles purchased, then, as the contract was entire, such acceptance and receipt would have taken all the goods purchased out of the statute. But in Price *v.* Lea, 1 B. & C. 156, where the contract was not entire, the receipt and acceptance of a part of the goods had no effect as to other goods not coming within the same contract. There the traveller of A. & Co. in London, having called upon B. in the country for orders, B. gave an absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye at a certain price. The traveller said the price was too low, but that he would write to his principals, and if B. did not hear from them in one or two days he might consider that his offer was accepted. A. & Co. never wrote to B., but sent all the goods. It was held that this was not a joint order for them all, so as to make the acceptance of the cream of tartar the acceptance of the lac dye also, within the statute. Holroyd, J., said: "A contract for the cream of tartar was made between the defendant and the traveller, but the agreement for the residue cannot be considered as complete until the time allowed to the plaintiffs for deliberation had expired. There was not, then, one contract for both the articles, so as to make the acceptance of one the acceptance of the whole." The marginal note in Thompson *v.* Maceroni, 3 B. & C. 1, is very misleading. It is there said: "Where goods of the value of £144 were made to order, and remained in the possession of the vendor at the request of the vendee, with the exception of a small part which the latter took away, — Held, that there was no acceptance of the goods within the statute of frauds, section 17." The court do in fact say this, but the more material part of what they say is omitted. What the court said was: "That there was no *actual acceptance* of these goods by the buyer within the 17th section of the statute of frauds, *and that the plaintiff was not entitled to recover on the count for goods sold and delivered.*" There are no such words in the statute as "actual acceptance." The language is, "except the buyer shall *accept part of the goods* so sold, and *actually receive* the same," — the acceptance being one thing and the actual receipt quite another. Instead of "no actual acceptance" the court meant that there was no "actual receipt" of the goods. The buyer here did, in the very language of the statute, "accept part of the goods so sold, and actually receive the same," and the requirements of the statute were met, so that a count for goods bargained and sold, or on the special contract, could have been sustained. 1 Ch. Pl. (16 Am. ed.) 356. But in Thompson *v.* Maceroni, 3 B. & C. 1, the defendant had been held to bail upon an affidavit for goods *sold and delivered*. Bail above were put in and justified. After issue was joined a special count for not delivering a bill of exchange was added. At the trial evidence was given of an order for the goods, and of their having been made pursuant to the order, and that the goods remained in the plaintiff's possession at the request of the defendant, and were of the value of £144; that the defendant took away a small part, of the value of £2 10*s*. No bill was given, and the plaintiff, at the trial, obtained a verdict for £144 on the count for not delivering the bill. A rule *nisi* was obtained for entering an *exoneretur* on the bail-piece, on the ground that the plaintiff had recovered on the special count for not delivering the bill. Counsel for the defendant showing cause contended that there was sufficient evidence to entitle the plaintiff to recover on the count for goods sold and delivered. But there having been no actual receipt of the goods, it was properly held that the count for goods sold and delivered would not lie, and the rule was made absolute. But the verdict on the special count was not attacked or questioned, as that count was sustainable, notwithstanding the statute, there having been an acceptance and actual receipt of a part of the goods. Parke, B., in Elliott *v.* Thomas, 3 M. & W. at p. 177, says of Thompson *v.* Maceroni, 3 B. & C. 1: "The court held that the acceptance of a small part of goods to the value of £144, made to order, was not sufficient to enable the seller to recover against the buyer for the price of the whole as for goods *sold and delivered*. The court there say, in effect, that there was no proof of actual *delivery*, nor such proof of actual acceptance as to take the case out of the statute of frauds, *i. e.*, the defendant had not accepted the whole, *so that a count for goods sold and delivered could be maintained for the whole.* That case seems to me to have turned entirely on the form of the action; the plaintiff could not succeed unless there was a delivery of the whole, or at least an actual acceptance and receipt of the whole, so as to be equivalent to a delivery." The old case of Goodall *v.* Skelton (A. D. 1794), 2 H. Bl. 316, is to the same effect. This was an action for goods sold and de-

livered, in which a verdict was found for the plaintiff, with liberty for the defendant to move for a new trial or a nonsuit, in case the court should be of opinion that the action could not be maintained. The material facts were that the plaintiff had agreed to sell a quantity of wool to the defendant, a shilling earnest being paid on the part of the defendant to bind the bargain. The wool was packed in cloths furnished by the defendant for that purpose, and left at a hovel belonging to the plaintiff, and the defendant was to send his waggon in a few days to take it away. But while the defendant's servant was weighing and packing it, the defendant proposed to the plaintiff to fix the time when the waggon should come, to which the plaintiff replied that "it should not go off his premises till he had the money for it." The court held that the action would not lie, and the rule for a nonsuit was made absolute. So, in Simmons *v.* Swift, 5 B. & C. 857, where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him; it was held that an action for goods sold and delivered, could not be maintained for the residue. And in Boulter *v.* Arnott, 3 Tyrwh. 267, the distinction is still more clearly taken. The action was for goods sold and delivered. At the trial it appeared that the plaintiff had bought from the defendant a quantity of cigars, on ready money terms; the plaintiff having refused to give credit. The cigars were packed at the plaintiff's house in the defendant's boxes, he promising to call in a day or two to pay for them and take them away. The plaintiff was nonsuited, on the ground that no delivery was proved, and that there was no count for goods bargained and sold; leave being reserved for him to move to enter a verdict for the price of the cigars. The nonsuit was sustained; Lord Lyndhurst saying: "Whatever was done as to packing these articles, must be taken with reference to the contract of sale, which was for ready money. Now that contract imported that the purchaser was to pay the money on the delivery of the goods; therefore it could never be intended that by the packing them in the defendant's boxes on the plaintiff's premises, they should then pass into the defendant's possession by delivery without payment of the money. Besides, it appears here that the cigars were not to be taken possession of by the defendant till paid for. *Had the declaration contained a count for goods bargained and sold, the plaintiff might have recovered.*" But where goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property. On this principle it was held in Chaplin *v.* Rogers, 1 East, 192, after a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person (by whom, though against the vendee's approbation, it was taken away), is sufficient to warrant the jury in finding a delivery to and acceptance by the vendee, thereby taking the case out of the statute. In Anderson *v.* Scott, 1 Camp. 235, n., which was a special assumpsit for the non-delivery of wine bought by the plaintiff of the defendant, it appeared that the plaintiff went into the defendant's cellar and selected several pipes of wine, for which he agreed, by parol, to pay a certain price. The spills or pegs by which the wine is tasted, were then cut off; plaintiff's initials were marked on the casks by defendants' clerk in his presence, and plaintiff took the gauge numbers. It was objected that this sale was within the statute of frauds; but Lord Ellenborough held, that the cutting off the spills, and the marking of plaintiff's initials on the cask by defendants' agent, in presence of all the parties, amounted to a delivery. It was then contended that this proved the contract laid in the declaration to have been performed; that the plaintiff, while complaining of the non-delivery of the wine, had himself proved that it had been delivered. But Lord Ellenborough held, that although there had been an incipient delivery, sufficient to take the case out of the statute of frauds, yet that delivery not having been perfected, plaintiff had a right to his action to recover damages for the non-completion of his contract. Again, in Dodsley *v.* Varley, 12 A. & E. 832, the defendant having bargained with the plaintiff for the purchase of wool from plaintiff at a certain price, removed it to a warehouse used by defendant for that purpose, but belonging to a third party. There the wool was weighed and packed in sheeting of the defendants. The course of dealing was that the wool remained on those premises till paid for. It was held that this was a sufficient delivery and acceptance of the goods within the statute, to ground an action for goods sold and delivered; that the defendant was in actual possession of the wool at the warehouse as soon as it was weighed and packed, that it was thenceforward at his risk, and, if burnt, must have been paid for by him. That, consistently with this, the plaintiff had, not what is commonly called a lien, determinable on the loss of possession, but

a special interest, sometimes but improperly called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment; this special interest being consistent with the possession having passed to the buyer, so that there may have been a delivery to, and actual receipt by him. But in Maberley *v.* Sheppard, 10 Bing. 99, the defendant employed the plaintiff to construct a waggon, and while the vehicle was in the plaintiff's yard unfinished, the iron work for the waggon was purchased by the defendant of another person, who assisted the plaintiff's men in putting it on, and charged the defendant for his time. The defendant also purchased a tilt from another person, which was afterwards carried to the plaintiff's yard and fixed by his men on the waggon. These things having been done before the waggon was finished, and there being no proof of actual delivery, the plaintiff was nonsuited. The court sustained the nonsuit on the ground that the acts were done merely while the work was in progress, and not after the waggon was finished and capable of being delivered. Tindal, C. J., in delivering the judgment of the court, said: "There are decisions which go the length of holding, that as long as the vendor retains his right of lien over the whole of the commodity sold, there has been no such delivery and acceptance as the statute intended. And again, that unless there has been a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and an actual acceptance by the latter, with an intention of taking possession as owner, the statute is not satisfied; and, undoubtedly, the present case cannot be held to fall within the compass of either of those decisions. For the plaintiff retained his lien upon the waggon, and there was nothing in the facts that denoted any intention either to deliver or to accept. The circumstances of this case certainly leave it open to doubt whether the statute has been complied with or not; but we think it is the duty of the plaintiff to free the case from all doubt, and where any remains, that it is safer to adhere to the plain, intelligible words of the statute, which point as clearly as words can to an actual delivery, and an actual receiving of part or the whole of the goods sold. Upon this ground, we hold that, in the present case, the requisites of the statute have not been complied with, and that the rule for setting aside the nonsuit and entering a verdict for the plaintiff must be discharged." In Phillips *v.* Bistolli, 2 B. & C. 511, the plaintiff, who was an auctioneer, put up for sale, among several other articles, a pair of ear-rings, one of the conditions of sale being that the purchaser should pay thirty per cent. upon being declared the highest bidder, and the residue of the price before the goods were removed. The defendant was a foreigner, and did not fully understand the English language; but he was in the habit of attending the plaintiff's sales, and purchasing goods. The ear-rings in question were knocked down to him as the highest bidder, at the price of eighty-eight guineas. They were immediately delivered to him, and he received them without making any objection. After they had been in his hands a few minutes, a person who interpreted for him said to the plaintiff that the defendant had bidden for the ear-rings under a mistaken idea that they were knocked down to him for forty-eight guineas. The plaintiff said that the last bidding had been mentioned three times. The defendant then returned the ear-rings. The plaintiff, however, refused to take them back, but said he would keep them on defendant's account. It was objected on the trial, on the part of the defendant, that there was no acceptance of the goods by him so as to take the case out of the statute of frauds. But Abbott, C. J., was of opinion that there was a sufficient acceptance, provided that the defendant was under no mistake when he bid the eighty-eight guineas, and the jury having found there was no mistake, a verdict was entered for the plaintiff. On motion for a new trial, the court held that the evidence of acceptance was very slight, and that, under the circumstances, it should have been submitted to the jury, as a question of fact, whether there was a delivery by the vendor, and an actual acceptance by the vendee, intended by both parties to have the effect of transferring the right of possession from the one to the other. See further as to delivery to satisfy the requirements of the statute, Elmore *v.* Stone, 1 Taunt. 458; Howe *v.* Palmer, 3 B. & Ald. 321; Tempest *v.* Fitzgerald, *Ib.* 680; Hanson *v.* Armitage, 5 B. & Ald. 557; Carter *v.* Toussaint, *Ib.* 855; Bentall *v.* Burn, 3 B. & C. 423; Phillips *v.* Bistolli, 2 B. & C. 511.

BOOK IV.

PART I.

WHAT ARE WITHIN THE STATUTE.

THE opinion was expressed by Littledale, J., in Smith *v.* Surman,[1] that the legislature intended to embrace within some of the sections of the Statute of Frauds the subject-matter of all contracts. And in that case, where the defendant verbally bought trees that were then growing, but were to be felled by the plaintiff, the court held that the sale was not of an interest in lands within the meaning of the fourth section, but that it was a contract for the future sale of the timber, as goods, wares, or merchandise within the seventeenth section.

But there are clearly species of intangible property (*res incorporales*) which come within neither the fourth nor the seventeenth section of the statute. Thus, in Duncroft *v.* Albrecht,[2] although it was admitted that shares in a railway company were not land, and that they were, in effect, personal estate, yet it was held that they are not personal estate of the quality of goods, wares, and merchandise within the meaning of the seventeenth section of the statute. The ground taken for the distinction was that that section applied only to goods, wares, and merchandise which are capable of being *in part delivered*. But this does not appear tenable, as railway shares, by the transfer of the certificates, would be quite as capable of being in part delivered, as goods would be by the transfer of warehouse receipts. The better reason would seem to be that shares, though personalty, differ from "goods, wares, and merchandise"[3] in being intangible; merely *choses in action*, and not tangible goods. And, in fact, this is

[1] 9 B. & C. 561 (17 E. C. L. R.).
[2] 12 Sim. 189, 196.
[3] "Goods and *chattels*," used in the statute of James, as being in the order and disposition of the bankrupt at the time of his bankruptcy, is a stronger term. Not only bills of exchange but debts have been held to be within that statute. "These words are 'goods and chattels,' which means all personal property, the title to which is evidenced by possession." Hornblower *v.* Proud, 2 B. & Ald. 327, 335. And see *Ex parte* Pease, 1 Rose, 232; *Ex parte* Dumas, 1 Atk. 232; *Ex parte* Burbridge, 1 Deac. 131; *Ex parte* Ord, *Ib.* 166; *Ex parte* Vallance, 2 Deac. 354.

all that seems to be meant, that is, that the shares themselves are intangible; simply *choses in action*, and, therefore, are not tangible goods, wares, and merchandise, and, being intangible, are incapable not only of *part* delivery, but of delivery at all.[1]

The English authorities are not considered harmonious with reference to whether the sale of growing crops comes within section 4 or section 17 of the statute. We examine the cases in detail which bear upon the subject.

The distinction is taken in a very old case in Hobart[2] between *fructus industrialis* and *fructus naturalis;* the latter, "as of grass or hay which run meerly with the land," going to the heir, and the former to the executor. For corn, being "*fructus*

[1] This is apparent in Humble *v.* Mitchell, 11 A. & E. 205, 208, where the question arose as to shares in a joint stock banking company. Lord Denman there says: "The point is whether the shares in this company are goods, wares, or merchandises, within the meaning of § 17 of the statute of frauds. It appears that no case has been found directly in point; but it is contended that the decisions upon reputed ownership are applicable, and that there is no material distinction between the words used in the statute of frauds, and in the bankrupt act. I think that both the language and the intention of the two acts are distinguishable, and that the decisions upon the latter act cannot be reasonably extended to the statute of frauds." In Tempest *v.* Kilner, 3 C. B. 248, it was held that a contract for the sale of shares in a projected railway is not within the statute of frauds. This was followed by Bowlby *v.* Bell, 3 C. B. 284, 290. Heseltine *v.* Siggers, 1 Ex. 856, shows still more plainly that it is the intangibility of the stock, as a mere *chose in action*, represented by stock certificates, as distinguishing it from tangible goods, wares, and merchandise, that excludes it from the operation of the statute, rather than its incapability of delivery. There, in an action for *not delivering* foreign stock, it was held that a contract relating thereto was not within the 17th section of the statute; and that a contract for the sale of stock, exchequer bills, and securities of that description, *in which the property passes by delivery*, differs from a contract for the sale of a specific chattel, inasmuch as a contract for the sale of stock, exchequer bills, &c., would be satisfied *by the delivery* of any stock or bills of the description bargained for, and consequently the contract for sale cannot mean an actual sale, *but only a contract to deliver*. In Watson *v.* Spratley, 10 Ex. 222, it was held that shares in a joint-stock mining company are not an interest in land within the 4th section, nor goods, wares, or merchandise, within the 17th section. And see Hibblewhite *v.* McMorine, 6 M. & W. 224; Bligh *v.* Brent, 2 Y. & C. 268; Weekley *v.* Weekley, cited *Ibid.* 297; Northey *v.* Johnson and Comteis *v.* Johnson, cited in Watson *v.* Spratley, 10 Ex. 242; Knight *v.* Barber, 16 M. & W. 70; *Ex parte* Vauxhall Bridge Co., 1 Glyn & J. 101; *Ex parte* Lancaster Canal Co. 1 Mont. & Bli. 94. The shares of proprietors, as individuals, in a railway, are personalty, being nothing more than a right to have a share of the net produce of all the property of the company. *Per* Parke, B., in Bradley *v.* Holdsworth, 3 M. & W. 122. But lands purchased by a company, and converted into a dock, according to an act of Parliament, which declares that the shares of the proprietors shall be considered as personal property, are subject to a land tax, and ratable to the poor in proportion to the annual profits. Rex *v.* Hull Dock Co., 1 T. R. 219. But that is a rate on the property in the hands of the company; not on the share of any individual proprietor. *Per* Lord Abinger, in Bradley *v.* Holdsworth, 3 M. & W. at p. 423. And see Rex *v.* Richardson, 3 Burr. 1341; Rowls *v.* Gells, Cowp. 451; Rex *v.* The Mayor, &c. of London, 4 T. R. 21; Rex *v.* The Commissioners, &c., 4 T. R. 730. And see an elaborate judgment in Rex *v.* Rodd, Caldec. 149, as to the non-ratability of tolls, profits, and other intangible matter. In Rex *v.* Shalfleet, 4 Burr. 2011, it was held that salaries do not come within the statute of 43 Eliz. 3, 2, as being "personal estate within the parish;" that they were not such a species of property as could be rated to the relief of the poor. All such intangible property, analogously, is excluded from being affected by the statute of frauds.

[2] Grantham *v.* Hawley, Hob. 132.

industrialis, so that he that sows it may seem to have a kind of property *ipso facto* in it divided from the land; and, therefore, the executors shall have it, and not the heirs." And in this case it was held that growing corn sold by the lessee could be sold by him, and would pass to the vendee and not to the reversioner; "for though the lessor had not the corn actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant, as 21 H. 6." [1]

The same distinction was taken in Latham *v.* Atwood.[2] There, a woman, tenant for life, died in August, leaving hops then growing and not severed, but growing out of ancient roots. It was claimed that they went to the husband and not to him in remainder, because she died so small a while before the gathering of them; "and they are such things as grow by manurance and industry of the owner, by the making of hills and setting poles." And the court so held, — that they are like emblements, which shall go to the husband or executor of the tenant for life, and not to him in remainder, "and are not to be compared to apples or nuts, which grow of themselves."

But in a case in Lord Raymond,[3] Treby, Chief Justice, reported to the other justices that it was a question before him at a trial at *nisi prius* at Guildhall, whether the sale of timber growing

[1] But in Spencer's Case, Winch, 51 (A. D. 1792), it was adjudged that where a man seized in fee sowed land, which he devised in fee and died before the severance, the devisee should have the corn and not the executor of the devisor. But in a late case, Cox *v.* Godsalve, Holt's MS., cited 3 East, 604, n., it was decided as in Grantham *v.* Hawley, Hob. 132, that, where one devised a farm in his own occupation to his mother for life, remainder to G. in tail, and also bequeathed to his mother "all his goods and chattels, stock of his farm, bonds, &c. and all other his movables whatsoever," and made her executrix; the growing corn, which was not reaped till after the death of the testator and of his mother, who died soon after him, passed to her representative and not to the devisee of the land. The corn was held to pass to his mother by the bequest of his goods.

Land was mortgaged, the mortgage containing a stipulation that the mortgagors could cut the timber on it as fast as they paid the instalments as they fell due, and no faster. While instalments were due and unpaid, the mortgagors cut timber and sold it to the plaintiff. The assignees of the mortgage took possession of the timber, and, after they had been paid the instalments due and interest, they sold the timber and appropriated the proceeds to themselves. The Supreme Court of the United States held, affirming the judgment of the Circuit Court for New Hampshire, that growing timber is a part of the land; that, in this case, the sale by the mortgagors of the timber after it was cut, did not divest the lien of the assignees of the mortgage; the purchaser taking the timber subject to their paramount rights. The assignees could follow it and take possession of it, and hold it until the designated amounts due at the time were paid. When these were paid, their rights over it ceased, and the vendee of the mortgagors became invested with a complete title. The subsequent detention of the timber was wrongful, and the sale of it a conversion, for which they were liable to the purchaser. Hutchins *v.* King, 1 Wall. 53.

[2] Cro. Car. 515.

[3] *Anon.* 1 Ld. Ray. 182.

upon the land ought to be in writing within the fourth section of the Statute of Frauds, or might be by parol. And he was of opinion, and gave the rule accordingly, that it might be by parol, "because it is but a bare chattel." And to this opinion Powell, Justice, agreed.

In Poulter *v.* Killingbeck,[1] A. agreed with B. to let him land rent-free on condition that A. should have a moiety of the crops. While the crop was in the ground it was appraised for both parties. A. declared in *indebitatus assumpsit* for a moiety of the value of the crop sold to B., without stating the special agreement. It was held that *indebitatus assumpsit* would lie, and, *semble*, that such an agreement need not be in writing, under the fourth section of the statute. *Per* Buller, J., "This agreement does not relate to any interest in the lands, which remains altogether unaltered by the arrangement concerning the crops."

By the 4th section of 23 Geo. 3, c. 58, there is an exemption from stamp duty, [illegible] the act, of "any memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandises."

A question arose under this act in Waddington *v.* Bristow,[2] where there was an agreement for the sale of all the hops then growing on twenty-two acres of land, which were subsequently, "after they had been pulled and gathered," to be delivered to the purchaser by the seller, in pockets; whether such agreement came within the above exception; and it was held that it did not. The soundness of the decision has been greatly questioned,[3] and we think very correctly so. The reasoning by the judges in the case is very inconclusive. Lord Alvanley's decision was based on the ground that the defendant undertook to sell *the whole produce* of twenty-two acres in his possession, and if he had sold one bushel to any other person he would have been liable to an action. "He agreed to sell the whole produce of the land in a certain state; the first term of the agreement is, that he will sell *the whole produce of the land*, and the second, that it shall be in a certain state at the time of delivery. It is therefore an agreement for the sale of goods, wares, and merchandises, and something more." What more it was, it is difficult to see. It was simply a sale of a specific growing crop, to be gathered and delivered by the seller. And Chambre, J., "The declaration puts the matter beyond all doubt, for it states the contract to be for the specific produce of twenty-two acres of land

[1] 1 B. & P. 397.
[2] 2 B. & P. 452.
[3] See Blackburn on Sales (2d ed.), 7; Rodwell *v.* Phillips, 9 M. & W. 503, *per* Parke, B.

alleged to be in the possession of the vendor. Now the statute only exempts contracts for the sale of goods, wares, and merchandises. But this contract gives the vendee an interest [In what? in the whole land? No!] *in the whole produce* of that part of the vendor's farm which consists of hop grounds. If the vendor had grubbed up the hops, or had refused to gather or dry them, it would have been a breach of the contract. [Here the matter is put analogously to the case of the sale of a specific unfinished chattel, to be finished and delivered by the vendor, which none the less is within the statute.] Though I admit that a contract for the sale of so many hops as twenty-two acres might produce, to be delivered at a distant day, might fall within the exemption of the act, notwithstanding the hops were not in the state of goods, wares, and merchandises, at the time of the contract made, yet I cannot think the present agreement within that exemption, since it gives an interest to the vendee [in what?] *in the produce* of the vendor's land."

While we see no force in the distinction here made, the sale being, in fact, simply the sale of the hops which the specific "twenty-two acres might produce," the opinions of the other judges, Heath and Rooke, JJ., were not concurred in, that the agreement must be taken with reference to the time at which the contract was made, as to the then state of the subject of the sale. It is noteworthy that none of the judges intimated that such an agreement, whatever more they thought it might have been than an agreement for the sale of goods, wares, or merchandise, gave any interest whatever in the land. Although it has been generally considered that this case is, in effect, a decision applicable to the seventeenth section of the Statute of Frauds, the *ratio decidendi* of the case, different from that which it has been assumed to be, really is, that, as the sale of the hops was held to be a sale of goods, wares, or merchandise, and the agreement was not exempt from the effect of the fourth section of the Stamp Act, because of the "something else" that was in it; as regards the seventeenth section of the Statute of Frauds, particularly as amended by Lord Tenterden's Act, it was a sale within that section, as of specific goods, wares, or merchandise, thereafter to be delivered by the seller. So, as regards the Statute of Frauds, the effect of the case is just the opposite of that which it is generally assumed to be.[1]

In Crosby *v.* Wadsworth,[2] the plaintiff agreed by parol with the defendant for the purchase of a standing crop of mowing grass,

[1] See *post*, note to Rodwell *v.* Phillips, 9 M. & W. 501.

[2] 6 East, 602.

then growing in the defendant's close; the grass to be mowed and made into hay by the plaintiff. It was held that this was within the fourth and not within the seventeenth section of the statute, as under the contract this gave him such an interest in the land as would enable him to maintain trespass against a wrong-doer interfering with the grass before it was cut. Lord Ellenborough delivered the judgment in this case, in which he used some language, with reference to the assumed holding in Waddington *v.* Bristow,[1] and to other matters, which is scarcely sustainable. In fact, in Parker *v.* Staniland,[2] Lord Ellenborough himself expressly departed from much that he had said in Crosby *v.* Wadsworth.[3] In Parker *v.* Staniland, there was a contract by the owner of a close cropped with potatoes, made on the 21st of November, to sell to the defendant the potatoes at 4*s.* 6*d.* a sack, the defendant to get them out of the ground immediately; and it was held that this was not a contract for any interest in land within the fourth section of the Statute of Frauds, but was the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse, from whence they were to be removed by the defendant. Lord Ellenborough made the distinction between this case and Crosby *v.* Wadsworth, that in the latter, under the contract, the purchaser was, in effect, a lessee, having a possessory right to the land which would enable him to maintain *trespass quare clausum* or ejectment; whereas in the latter the purchaser had only an easement, — a right to come upon the land for the purpose of raking up and carrying away the potatoes, which gave him no interest in the soil. Lord Ellenborough also intimated that he was not disposed to extend the case of Crosby *v.* Wadsworth.

Emmerson *v.* Heelis[4] was decided on the assumption that Waddington *v.* Bristow[5] was a decision under the Statute of Frauds, which, as we have seen, it was not; but that, in fact, it did in effect decide that the hops there sold came within the seventeenth section of the statute, as a sale of goods, wares, and merchandise. Assuming, however, to follow Waddington *v.* Bristow, it was held by the court in Emmerson *v.* Heelis (Lord Mansfield delivering the judgment) that a sale of growing turnips, no time being stipulated for their removal, and the degree of their maturity being not positively found, is a sale of an interest in land within section four of the statute. The question was raised whether still the sale was not within section seventeen, as being a sale of goods,

[1] 2 B. & P. 452.
[2] 11 East, 362, 363.
[3] 6 East, 602.
[4] 2 Taunt. 38.
[5] 2 B. & P. 452.

wares, or merchandise; but this was not decided, as it was held that the turnips having been in different parcels, neither of which amounted to £10, the sale would not, on that ground, come within the seventeenth section.[1] The case itself, decided as it was on a misapprehension of the holding in Waddington *v.* Bristow, is, we think, of very little authority. Several of these old cases, like others cited by us, *supra*,[2] were evidently decided under the view of the operation of the statute, then largely prevalent, which led to the passage of Lord Tenterden's Act.

Lord Ellenborough still further departed from much of his reasoning in Crosby *v.* Wadsworth,[3] in his judgment in Warwick *v.* Bruce.[4] In this case the defendants agreed by parol to sell to plaintiff all potatoes then growing on three acres, at so much *per* acre, to be dug up and carried away by plaintiff. The plaintiff paid £40 to the defendant under the agreement, and dug a part and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue. It was held that this agreement was not within the fourth section of the statute. Lord Ellenborough said: "If this had been a contract conferring an exclusive right to the land for a time for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of Crosby *v.* Wadsworth. But here is a contract for the sale of potatoes at so much *per* acre; the potatoes are the subject-matter of sale, and whether at the time of sale they were covered with earth in the field, or in a box, still it was a sale of a mere chattel. It falls therefore within the case of Parker *v.* Staniland;[5] and that disposes of the point in the Statute of Frauds."[6]

Indebitatus assumpsit was held to lie, in Mayfield *v.* Wadsley,[7] for a crop of growing wheat, to be reaped by the purchaser.[8] But

[1] Even assuming that Emmerson *v.* Heelis, 2 Taunt. 38, was correctly decided (which we think it was not), yet the inclination of Lord Mansfield seemed to be to hold, that had the turnips been bought in one lot, for more than £10, they still would have come within the 17th section. Practically, however, this is not important, for the same note or memorandum in writing which would take the case out of the 4th would also take it out of the 17th section. The importance in these cases is where the subject is within the 17th and *not* within the 4th section; for then part payment, etc., would take the case out of the statute, which would not apply to cases coming within the 4th section.

[2] Page 217, n.

[3] 6 East, 602.

[4] 2 M. & S. 205.

[5] 11 East, 362.

[6] Groves *v.* Buck, 3 M. & S. 178, although usually cited with this class of cases, is not directly on the question of growing crops, but rather on that as to whether the sale of goods incapable of delivery at the time of the contract comes within the 17th section, — a question disposed of, at all events, by Lord Tenterden's Act. See Owen *v.* Legh, 3 B. & Ald. 470, on the sale of standing corn and growing crops upon a distress for rent, under 11 Geo. 2, c. 19, § 8.

[7] 3 B. & C. 357.

[8] In this case, Holroyd, J., followed

in Teal *v.* Auty,[1] a contract for the purchase of growing poles, which the defendants were to cut down and carry away, was held to be within the fourth section of the statute, as an agreement for the purchaser of an interest in lands.[2] So, in Scovell *v.* Boxall,[3] which was an action of trespass for cutting down and carrying away underwood; the question was whether the plaintiff, who had purchased by parol the underwood, then standing, to be cut by him, had such a possession as would enable him to maintain trespass against the defendants for cutting and carrying it away, and it was held that he had not, — that the agreement related to an interest in land, and was void under the fourth section of the statute.[4]

Anon. in 1 Ld. Ray. 182, quoting from Treby, C. J., as saying, "that a sale of timber growing upon the land need not be in writing, because it was a bare chattel," and to that opinion Powell, J., agreed, — adding: "In some cases, therefore, crops growing upon the land may be considered as goods and chattels; and crops agreed to be taken by an incoming of an outgoing tenant may be recovered under a count for goods bargained and sold." Littledale was of the opinion, however, that the action would not lie; but it was on the ground that, coupled with the sale of the wheat, there was also a sale of the land. He says: "If the giving up of the land was any part of the consideration for the defendant's agreeing to take the wheat which was then sown in the land, the wheat must be considered as part of the land itself. It is true that in some cases there may be a contract for the growing crops independently of the land itself; but where the land is agreed to be sold, and the vendee takes from the vendor the growing crops, the latter are considered part of the land. It by no means follows, therefore, that because the crops formed the subject of a distinct valuation, they were the subject of a distinct contract of sale. Most of the cases where this question has arisen were upon contracts for growing wheat, potatoes, and things of that nature, distinct from any assignment or letting of the land, and they have been held not to be within the statute. [The 4th section is here meant. AUTH.] Here the agreement did not relate to the mere sale of the produce of the land. . . . A parol agreement for the sale of crops may be good also between the outgoing and the incoming tenant; but then there would be no sale of any interest in the land, for that would come from the landlord. Since, then, it seems that the plaintiff had some interest in the land, it appears to me that the crops were part of the land; but I express this opinion with diffidence, after the opinion delivered by my lord and my brothers."

[1] 2 Br. & B. 99.

[2] In Grover *v.* Coles, 1 Bing. 6, it was held that there was no variance between a declaration and a replevin bond, in the former of which the language used was "goods and chattels;" and in the latter, "growing crops of corn" was included with "goods and chattels." The court held that the crops of corn were chattels "on the farm and lands of the plaintiff," and clearly so under the 11 Geo. 2, c. 19, § 8, which made growing corn a chattel.

[3] 1 Y. & J. 396.

[4] Hullock, B., in this case, said: "It was incumbent on the plaintiff to establish his right to an interest in the freehold, for trees annexed to the freehold are parcel of the inheritance and pass with it. Com. Dig. *Biens*, H. . Corn and other articles which are raised by the industry of man are emblements which go to the executor, and may be taken in execution; but things which give no annual profit, or which proceed without the labor of man, are not emblements: they go to the heir, and cannot be seized under a *fi. fa.* The case of Evans *v.* Roberts, 5 B. & C. 829, and other cases upon this subject, will be found to range themselves under this principle, and to be reconcilable with this distinction. My brothers, Bayley and Holroyd, in the case of Mayfield *v.* Wadsley, 3 B. & C. 357, were of opinion that an off-going crop might be considered as goods and chattels; and the judgment of Mr. Justice Littledale in that of Evans *v.* Roberts proceeds expressly on the ground of distinction between such things as go to the heir or to the executor. There is a manifest distinction between crops and the subject-matter of this contract. It is true that the *dictum* in Lord Raymond is opposed to this opinion; but it is to be remembered that if that were law, the

The case of Evans *v.* Roberts[1] is quite a valuable one on the question. This was an action of *indebitatus assumpsit* for a crop of potatoes bargained and sold. They were purchased in September, under a verbal agreement, for a price less than £10. The potatoes were then in the ground, and were to be turned up by the seller. The defence was that the contract was for an interest in or concerning lands, and was void within the fourth section of the statute. The court held otherwise. Independent of the fact that the seller was to dig the potatoes, therein differing from Crosby *v.* Wadsworth,[2] where, by the terms of the contract, the buyer did acquire an interest in the land, for he was to mow the grass, and must, therefore, have had the possession of the land for that purpose; the case was distinguished from Crosby *v.* Wadsworth, further, on the ground that, in that case, the subject of the sale was growing grass, the natural and permanent produce of the land, renewed from time to time without cultivation; and that growing grass does not come within the description of goods and chattels; cannot be seized as such under a *fi. fa.*; and goes to the heir and not to the executor. But growing potatoes come within the description of emblements; are deemed chattels by reason of their being raised by labor and manurance; go to the executor of tenant in fee simple, although they are fixed to the freehold, and may be taken in execution under a *fi. fa.*, by which the sheriff is commanded to levy the debt of the goods and chattels of the defendant. Therefore, the potatoes, being chattels, come within the seventeenth and not the fourth section of the statute.[3]

Smith *v.* Surman[4] is another important case on the subject. There the owner of trees verbally agreed with the defendant, while trees were standing, to sell the defendant a quantity of timber; the trees to be felled by the seller, and the timber to be

several modern cases which have been decided could never have arisen. I must confess that I never before heard that *dictum* cited as an authority; and the only claim which it has, in my opinion, to that distinction, is the allusion to it by Mr. Justice Holroyd. The Court of Common Pleas, however, have in a modern case (Teal *v.* Auty, 2 Br. & B. 99) decided that the sale of growing poles does confer an interest in land. Upon these grounds I am of opinion that this was a sale of an interest in land; and that, the action being founded on property, the plaintiff has failed to show a right to maintain it."

[1] 5 B. & C. 829.

[2] 6 East, 202.

[3] Littledale, J., in this case, held, that a sale of any growing produce of the earth, reared by labor and expense, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land within the meaning of the 4th section of the statute, but a contract for the sale of goods, wares, and merchandise within the 17th section of that statute; and that the 4th section had respect to the sale of such an interest in the land as would entitle the vendee either to the reversion or the present possession of the land, and not such an interest as constitutes no part of the realty under a contract which only gives to the vendee an interest in that growing produce of the land which constitutes its annual profit.

[4] 9 B. & C. 561.

carried away by the defendant. The court held that this was a contract under the seventeenth section of the statute for the purchase of goods, wares, and merchandise. Here, Littledale, J., expressly held, in accordance with the view we have expressed in our note,[1] that where the contracting parties contemplate a sale, although the subject-matter of the contract does not exist in goods, but is to be converted into that state by the seller's bestowing work and labor on his own raw materials: that is a case within the seventeenth section of the statute. It is sufficient if, at the time of the completion of the contract, the subject-matter be goods, wares, and merchandise.[2]

The 7 Wm. 3, c. 12, *Ir.*[3] is the Statute of Frauds applicable to Ireland, the second and thirteenth sections of which are in effect the same as the fourth and seventeenth sections of the English act, unaffected by Lord Tenterden's Act. In Dunne *v.* English,[4] decided under this act, the action was in trover for five acres of turnips, containing 5000 cartloads. In October,

[1] See *infra*, p. 260, n. 1.

[2] The same learned judge further added: "I think that the contract in this case was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same within the meaning of the fourth section. Those words in that section relate to contracts (for the sale of the fee simple, or of some less interest than the fee) which give the vendee a right to the use of the land for a specific period. If in this case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land within the meaning of the statute. The object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels. Here the vendor was to cut the trees himself. His intention clearly was, not to give the vendee any property in the trees until they were cut, and ceased to be part of the freehold. I think, therefore, that there was not in this case any contract or sale of any interest in lands." In many of these cases the influence of the idea that existed prior to the passage of Lord Tenterden's Act, that if at the time the contract was made the subject of it was not then in a condition to be delivered under the contract, it was not within the 17th section, evidently had its effect in some of the cases where the contract was in relation to timber, or growing crops, not then in a state for delivery. Cases such as Towers *v.* Osborne, 1 Str. 506; Clayton *v.* Andrews, 4 Burr. 2101, and Groves *v.* Buck, 3 M. & S. 178, were decided on the principle that contracts for articles not then in a state for delivery under the contract, but to be made out of materials then in existence, were not within the 17th section. But, even before the passage of Lord Tenterden's Act, the better opinion was against the doctrine of these cases, and their assumed fallacy evidently led to the interference of the legislature in enacting that act. See Rondeau *v.* Wyatt, 2 H. Blk. 63; Garbutt *v.* Watson, 5 B. & Ald. 613; Cooper *v.* Elston, 7 T. R. 14. Watts *v.* Friend, 10 B. & C. 446, goes still further than these latter cases. In it the action was on an agreement between the plaintiff and defendant that the former should furnish the latter with a certain quantity of turnip-seed, which the defendant should sow on his own land, and sell and deliver the whole of the seed produced therefrom to the plaintiff, at a price assumed to have been in all greater than £10. The plaintiff supplied the seed; defendant sowed it, and harvested the crop, but refused to deliver it to the plaintiff. The court, following Smith *v.* Surman, 9 B. & C. 561, held that the agreement was within the 17th section; Lord Tenterden, in delivering the judgment, saying: "According to good common-sense this must be considered as substantially a contract for goods and chattels, for the thing agreed to be delivered would at the time of delivery be a personal chattel."

[3] See vol. iii., Irish Statutes, A. D. 1695–1698, p. 279 *et seq.*

[4] Hayes, 540.

1830, the defendant sold to the plaintiff a crop of turnips which he had sown a short time previously, for a sum less than £10. In February, 1831, and previously, while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them, which he converted to his own use, and for which the action was brought. There was no note or memorandum in writing made of the bargain. It was contended that the contract was void under the second section of the Irish act, as being for an interest in the land, and Emmerson *v.* Heelis,[1] Scovell *v.* Boxall,[2] and Waddington *v.* Bristow,[3] were relied on. But the court unanimously held that the contract was for the sale of goods, wares, or merchandise, and being for less than £10 was valid. The question is very satisfactorily dealt with by Lord Chief Baron Joy, in delivering the unanimous judgment of the court.[4]

[1] 2 Taunt. 38.
[2] 1 Y. & J. 396.
[3] 2 B. & P. 452.
[4] The judgment is as follows: "Joy, C. B. The general question for our decision is whether, in this case, there has been a contract for an interest concerning lands, within the second section of the statute of frauds, or whether it merely concerned goods and chattels; and that question resolves itself into another, whether or not a growing crop is goods and chattels. The decisions have been very contradictory, — a result which is always to be expected when the judges give themselves up to fine distinctions. In one case it has been held that a contract for potatoes did not require a note in writing, because the potatoes were ripe; and in another case the distinction turned upon the hand that was to dig them; so that if dug by A. B. they were potatoes, but if by C. D. they were an interest in lands. Such a course always involves the judge in perplexity, and the cases in obscurity. Another criterion must therefore be had recourse to; and, fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law growing crops were uniformly held to be *goods;* and they were subject to all the legal consequences of being goods, as a seizure in execution, etc. The statute of frauds takes things as it finds them; and provides for lands and goods according as they were esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop had been held to be an interest in lands, it would come within the second section of the act; but if it were only goods and chattels, then it came within the thirteenth section. On this, the only rational ground, the case of Evans *v.* Roberts, 5 B. & C. 828; Smith *v.* Surman, 9 B. & C. 561, and Scovell *v.* Boxall, 1 Y. & J. 396, have all been decided. And as we think that growing crops have all the consequences of chattels, and are, like them, liable to be taken in execution, we must rule the point saved for the plaintiff." The question of the right to emblements came up under a peculiar state of facts in Graves *v.* Weld, 5 B. & Ad. 105. There, tenant for a term determinable upon a life, sowed the land in spring, first with barley, and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover which had sprung up. The clover so taken made the barley straw more valuable by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing. It was held that the tenant was not entitled to emblements of either of these two crops: *first,* because emblements can be claimed only in a crop of a species which ordinarily repays the labor by which it is produced within the year in which the labor is bestowed; and, *secondly,* because, even if the tenant were entitled to one crop of the vegetable growing at the time of the *cesser* of his interest, this had been already taken by him at the cutting of the barley.

The principal authorities upon which the law of emblements depends are Littleton, § 68, and Coke's commentary on that

In a preceding Irish case[1] the decision was the same way. There trover was brought for twenty acres of growing barley; and although it was strongly insisted that the action did not lie, the court of King's Bench held the contrary, on the ground that, whether growing or not, the crops would be emblements, which would go to the executor, and might be seized under an execution.

The case of Jones *v.* Flint[2] was decided on the same principle. There plaintiff and defendant orally agreed, in August, that defendant should give £45 for the crop of corn on plaintiff's land, and the profit of the stubble afterwards; that plaintiff was to have liberty for his cattle to run with defendant's; and that defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields; defendant was to harvest the corn, and dig up the potatoes, and plaintiff was to pay the tithe. The crops, etc., were taken by the defendant in conformity with the agreement. In assumpsit for the price, the defendant relied on the Statute of Frauds. The court held that as to the crops of corn, potatoes, and the after profit of the stubble, the contract was for the sale of goods, wares, and merchandise within the sev-

passage. The former is as follows: "If the lessee soweth the land, and the lessor, after it is sown and before the corn is ripe, put him out, yet the lessee shall have the corn, because he knew not at what time the lessor would enter upon him." Coke says (Co. Litt. 55 *a*): "The reason of this is, for that the estate of the lessee is uncertain, and therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set roots or sow hemp or flax, or any other *annual* profit, — if, after the same be planted, the lessor oust the lessee, or if the lessee dieth, yet he or his executors shall have that year's crop. But if he plant young fruit-trees, or young oaks, ashes, elms, etc., or sow the ground with acorns, etc., there the lessor may put him out, notwithstanding, because they will yield no present annual profit." The case of hops, which grow from ancient roots, and which yet may be emblements, are an apparent exception to this rule. But in Latham *v.* Atwood, Cro. Car. 515, they were held to be "like emblements," because they were "such things as grow by the manurance and industry of the owner, by the making of hills and setting poles," the labor and expense, without which they would not grow at all, seeming to have been deemed equivalent to the sowing and planting of other vegetables. In Cruise's Dig. I., 110 *a*, it is said th[illegible]s determination was probably on[illegible]t of the great expense of cultivat[illegible]e ancient roots. Blackstone says: "If a tenant for his own life sows the lands, and dies before harvest, his executors shall have the emblements or profits of the crop, for the estate was determined by the act of God; and it is a maxim of the law that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labor and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which, being a public benefit tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it." And again: "The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit; but it is otherwise of fruit trees, grass, and the like, which are not planted annually at the expense and labor of the tenant, but are either a permanent, or natural, profit of the earth. For when a man plants a tree he cannot be presumed to plant it in contemplation of any present profit, but merely with a prospect of its being useful to himself in future, and to future successions of tenants." Blk. Com. 122, 123.

[1] Joyce *v.* Hayman, K. B. Ire. T. T. 1831; 4 Ir. Law Rev. 273.

[2] 10 A. & E. 753.

enteenth section of the statute, and not within the fourth; and the contract with reference to the lay grass, was, in effect, a contract for the agistment by the plaintiff of the defendant's cattle; that the possession of the land was, therefore, not in the defendant, but in the plaintiff; and, hence, as to the eating of the lay grass, it did not come within the fourth section of the statute.[1]

[1] Lord Denman, in delivering the judgment of the court, said: "Nothing, it will be observed, was expressly agreed on as to the possession of the land. It will be our duty, therefore, in construing the contract as to this particular, to have regard to its subject-matter, and to imply so much, and only so much, as is necessary to give full effect to its expressed terms, nothing appearing in the subsequent acts of the parties to influence our construction either way. Three things were the subject-matter of the contract, — crops of corn, potatoes, and the after eatage of stubble and lay grass. Of these all but the lay grass are *fructus industriales;* as such they are seizable by the sheriff under a *fieri facias,* and go to the executor, not to the heir. If they had been ripe at the date of the contract, it may be considered now as quite settled that the contract would have been held to be a contract merely for the sale of goods and chattels. And, although they had still to derive nutriment from the land, yet a contract for the sale of them has been determined from this their original character not to be on that account a contract for the sale of any interest in land." (See Evans *v.* Roberts, 5 B. & C. 829; *ante,* 229.) "The present case differs from Evans *v.* Roberts in this, that there the potatoes were to be dug up by the seller; the judgments, however, do not proceed on this distinction, although it was not unnoticed. Holroyd, J., expressly says that, even if they were to be dug up by the buyer, 'I think he would not have had an interest in the land.' And we agree that the safer grounds of decision are the legal character of the principal subject-matter of sale, and the consideration whether, in order to effectuate the intentions of the parties, it is necessary to give the vendee an interest in the land. Tried by these tests, we think that, if the lay grass be excluded, the parties must be taken to have been dealing about goods and chattels, and that an easement of the right to enter the land for the purpose of harvesting and carrying them away is all that was intended to be granted to the purchaser." On the other point decided the court said: "Upon this principle we are to examine whether the introduction of the lay grass into the contract ought to vary the decision. This is the natural produce of the land, not distinguishable from the land itself, in legal contemplation, until actual severance. It passes accordingly to the heir, not to the executor; and in Crosby *v.* Wadsworth, 6 East, 602, it was decided that the purchaser of a crop of mowing grass, unripe, and which he was to cut, took an exclusive interest in the land before the severance. If, therefore, this be a case in which the parties intended a sale and purchase of the grass, to be mowed or fed by the buyer, both on principle and authority the objection of the defendant must prevail. Looking, however, at the facts, we think this was not such a bargain. It may well be doubted, upon all the evidence, whether anything that could be called a crop of grass was in the ground, or in the contemplation of the parties at all, for it does not appear that any clover or other grass had been sown with the corn; and the word 'grass' seems merely to have been adopted by the witness in cross-examination from the defendant's counsel. But, not relying upon this, we find that the plaintiff was to pay the tithe, and that, after the harvesting, he reserved to himself the right of turning his own cattle into the fields; and we think that, however expressed, the more reasonable construction of the contract is that the possession of the field still remained with the owner after the harvesting as before. It was not necessary to the vendee before on account of the grass, because that, whatever it was, could not then be got at; nor did it need preservation; and afterwards it is more reasonable to consider the owner as agisting the vendee's cattle than as having his own cattle agisted by him whose interest at the best was of so very limited a nature. Upon these grounds, not impeaching the principle of Crosby *v.* Wadsworth, 6 East, 602, but deciding on the additional facts in this case, we think this incident in the contract does not alter its nature; and the objection founded on the statute will not prevail." Wood *v.* Manley, 11 A. & E. 34, although not a case within the statute of frauds, shows the right of a vendee of goods, wares, and merchandise, which are within the 17th section of the statute, to enter on the lands under a license for the removal of the goods. There goods which were upon plaintiff's land were sold to defendant by

Similar questions have been decided in the Court of Exchequer. In Earl of Falmouth *v.* Thomas,[1] the question came up on demurrers to the defendant's pleas. The contract there declared upon was that the plaintiff, who was possessed of a farm, upon which were certain growing crops, and on which the plaintiff had done certain work and labor, and expended certain materials in making the lands ready for tillage, of which work, labor, and materials he had not derived the benefit, would let the farm to the defendant for a term of years; and in consideration thereof the defendant undertook to take the crops and pay for them, and for the work, labor, and materials, according to a valuation. The plaintiff let the farm accordingly, and left the crops upon it. The defendant took possession of the farm, and had the benefit of the work, labor, and materials. The valuation was made, but the defendant did not pay. The court held that the contract was within the fourth section of the statute; that the defendant could not have the benefit of the work, labor, and materials unless he had the land; and that the right to the crops, and the benefit of the work, labor, and materials, were both of them an interest in the land. But that, if either of the two were properly an interest in land, this would form a sufficient objection to an action on the contract; for the crops and work and labor, united, were the consideration for the contract, and if either part of the consideration failed, the plaintiff would not be entitled to recover.[2]

Carrington *v.* Roots[3] was an action of trespass for seizing and impounding the plaintiff's horse and cart. The defendant pleaded that he was possessed of a certain close and crop of grass thereon, and that he distrained the horse and cart for being unlawfully on his close, and doing damage. The plaintiff, in his replication, alleged a contract (which proved to be verbal) under which he had bought the crop of the grass from the plaintiff with liberty to enter and cut the grass when ready to be cut, and that he was on the close with his horse and cart for the purpose of cutting and removing the grass. The court held that if this were a contract under the seventeenth section of the act, it was

the plaintiff's landlord under a distress. By the conditions of sale, to which plaintiff was a party, the buyer was to be allowed to enter and take the goods. It was held that, after the sale, plaintiff could not countermand the license. And, defendant having entered to take, and plaintiff having brought trespass, and defendant having pleaded leave and license and a peaceable entry to take, to which plaintiff replied *de injuriâ*, that defendant was entitled to the verdict, though it appeared that plaintiff had between the sale and the entry locked the gates and forbidden defendant to enter, and defendant had broken down the gates, and entered to take the goods. And see Winter *v.* Brockwell, 8 East, 308; Tayler *v.* Waters, 7 Taunt. 374; Liggins *v.* Inge, 7 Bing. 682; Bridges *v.* Blanchard, 1 A. & E. 536, further, as to leave and license.

[1] 1 Cr. & M. 88.

[2] See Thomas *v.* Williams, 10 B. & C. 664; Chater *v.* Beckett, 7 T. R. 20; Neale *v.* Viney, 1 Camp. 471.

[3] 2 M. & W. 248.

void, and if under the fourth section, being void under it, no action could be sustained which depended, as in this case, on an assumption of the validity of the contract. If the plaintiff had been sued by the defendant in trespass, he might have pleaded a license. The agreement might have been available in answer to a trespass, by setting up a license; not setting up the contract itself as a contract, but only showing matter of excuse for the trespass. In this case license was not alleged, but the contract itself was relied on.

In Sainsbury *v.* Matthews,[1] the defendant in the month of June agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at 2*s.* per sack, the plaintiff to have them at digging-up time (October), and to find diggers. It was held that this was not a contract for the sale of an interest in land, within the fourth section of the statute.[2]

In Rodwell *v.* Phillips,[3] where the question came up under the Stamp Act, it was held that an agreement for the sale of growing fruit from pear-trees is not a contract for the sale of goods, wares, and merchandise, but is an agreement for the sale of an interest in land, and if of the value of £20 requires a stamp. The ground upon which this case was decided was that such fruit is not *fructus industriales;* passes to the heir, and not to the executor; cannot be taken by a tenant for life, or levied in execution under a writ of *fi. fa.* by the sheriff; therefore it is distinct from all those cases where the interest would pass, not to the heir-at-law, but to some other person; the difference appearing to be between annual productions raised by the labor of man, and the annual productions of nature, not referable to the industry of man, except at the period when they were first planted.[4] There is another point in this case which escaped notice. The purchase was on the 14th of July, of the pears on the trees, then growing, for the one specific sum of £30, on which a deposit of £1 was then paid. Hence, if the contract had been binding, the property in the fruit on the trees would then have passed to the vendee; and any loss prior

[1] 4 M. & W. 343.

[2] Lord Abinger said: "I think this was not a contract giving an interest in the land. It is only a contract to sell potatoes at so much a sack on a future day, to be taken up at the expense of the vendee. He must give notice to the defendant for that purpose, and cannot come upon the land when he pleases." And Parke, B.: "This is a contract for the sale of goods and chattels at a future day, the produce of certain land, and to be taken away at a certain time. It gives no right to the land. If a tempest had destroyed the crop in the meantime, and there had been none to deliver, the loss would clearly have fallen upon the defendant. The case is stronger than that of Evans *v.* Roberts, 5 B. & C. 829, because here there is only a stipulation to pay so much per sack for the potatoes when delivered. It is only a contract for goods to be sold and delivered."

[3] 9 M. & W. 501.

[4] *Per* Lord Abinger, *ibid*, at p. 503.

to the gathering of the fruit would have been his, and not that of the vendor. This is quite different from the case where the contract is for future delivery at a price to be ascertained at the time of the delivery. Here, the loss prior to the delivery would be in the vendor, and would be but a contract for the sale of goods for future delivery, giving the vendee no interest in the land.[1]

[1] In this case, Parke, B., at p. 503, referring to Waddington *v.* Bristow, 2 Bos. & P. 452, said: "Hops are *fructus industriales*. That case would now probably be decided differently." We have already pointed out that Waddington *v.* Bristow was not decided under the statute of frauds at all, but under the Stamp Act. The case does not decide that the contract would not have been within the 17th section of the statute of frauds, nor does it decide that it would have been within the 4th section of that statute. The exemption under the Stamp Act only related to agreements for or relating to the sale of any goods, wares, or merchandises. What, in effect, the court held was, not that this was a contract for the sale of an interest in lands, but that, on the contrary, it was "*an agreement for the sale of goods, wares, and merchandise*, and something more." But that "something more" was not at all necessarily a contract for an interest in lands. The argument of Sergeant Shepherd is not addressed to the contention of there having been any such interest; but rather to this, that though it was a sale of goods "*before the goods were in esse*," it was not, therefore, any the less a sale of the goods than it would have been if a wine merchant undertook to deliver a certain quantity of wine in the ensuing year of the vintage of the current year. And Rooke, J., puts it thus: "The object of the legislature in introducing the exception of the 4th section [of the Stamp Act] was to prevent the duty which had been imposed by the 1st section upon all agreements generally from impeding ordinary commercial transactions. *But the subject of the agreement is a speculative bargain relative to things not in esse at the time when the contract was made.*" The case would seem to hold that though the sale was an agreement for the sale of goods, wares, and merchandise which would come within the purview of the 17th section of the statute of frauds, yet that there was something more in the contract, of a "speculative" character, which prevented it from being confined to the strict limits of the 4th section of the Stamp Act. Jones *v.* Flint, 10 A. & E. 753, is a case which might be similarly treated. There the sale was of a crop of corn and potatoes, which was held to come within the 17th section, and not the 4th section, of the statute. But there was a further portion of the contract which was held to be for an agistment of cattle, and, therefore, neither within the 4th nor the 17th section of the statute. Hence, while in this case the sale of the corn and potatoes would be a contract within the 17th section of the statute of frauds, as a sale of goods, wares, and merchandise, it would not as a whole be a contract within the exemption of the Stamp Act, because it was not only a contract for the sale of goods, wares, and merchandise, as the contract was held to be in Waddington *v.* Bristow, 2 Bos. & P. 452, but, as was also held in that case, "something more." So that, in one case as in the other, the contract might be held to be within the 17th section of the statute of frauds, and not within the 4th section of the Stamp Act. As will thus be seen, the difference between the effect of the 17th section of the statute of frauds and the 4th section of the Stamp Act is very material. Under the former, if the contract do not come within the 4th section of the statute of frauds, and is good as a contract for the sale of goods, wares, and merchandise under the 17th section, it is good no matter what else it may contain. But under the 4th section of the Stamp Act, the exemption from stamp duty only extends to contracts for the sale of goods, wares, and merchandise. Hence, if it is a contract for anything else, or for that *and* anything else, — whether it is matter within the 4th section of the statute of frauds or not, — it is not a contract which comes within the exemption of the Stamp Act. Therefore it follows that a contract for the sale of goods, wares, and merchandise may be perfectly valid under the 17th section of the statute of frauds, and not be within the exemption of the 4th section of the Stamp Act. Hence Waddington *v.* Bristow, 2 Bos. & P. 452, may have been — though we think it was not even that — a well-decided case under the Stamp Act, and yet have no bearing whatever upon the question of the proper construction of the statute of frauds.

This reasoning is fully sustained by the decision of the Court of Exchequer in Horsfall *v.* Hey, 2 Ex. 778, which was another case under the Stamp Act (55

The 2 & 3 Vic. c. 37, which in some respects repeals the usury laws, provides "that nothing therein contained shall extend to the loan or forbearance of any money upon security of any land, tenements, or hereditaments, or any estate or interest therein." A question arose in Washbourn *v.* Burrows,[1] the decision of which is equally applicable to the construction of the fourth and seventeenth sections of the Statute of Frauds. The action was in covenant for payment of £250 and interest on demand. The defendant pleaded that the covenant was entered into in pursuance of an usurious contract, by which the defendant agreed to pay more than £5 per cent. by way of interest, and that the payment was secured by a deed, whereby the defendant bargained and sold to the plaintiff, by way of security, certain personal chattels, and also "*the crops of grass then growing on certain lands.*" The plaintiff replied that the contract was entered into after the passing of 2 & 3 Vic. c. 37. It was held, on general demurrer, that the plea was good, and the replication bad; for though the term "crops of growing grass" might mean crops to be severed by the owner of the soil, and delivered as a personal chattel, yet the plea afforded a good *primâ facie* answer to the action, it being sufficient for the defendant to show that the contract was injurious within the 12 Anne, sec. 2, c. 16 (that statute being still in force as far as it was not affected by the statute of 2 & 3 Vic.); and if the plaintiff relied upon the 2 & 3 Vic. c. 37 as excepting the case from the operation of the act of 12 Anne, he should have replied that the contract was entered into after the passing of the statute of Victoria, and that the security did not relate to land.[2]

Geo. 3, c. 184). This was an action of trover for goods, chattels, and effects. There was a written memorandum of sale by the defendant to the plaintiff of "all the goods, stock-in-trade, and fixtures" in A. for £90. It was held that this instrument, being a conveyance relating to the sale, would have been within the exemption of the act, and required no stamp, *if it had not also embraced the transfer of fixtures.* And yet, as it is now well established (see *infra*) that the sale of unsevered fixtures is neither within the 4th nor the 17th section of the statute of frauds, a written contract for the sale of goods, wares, and merchandise, meeting the requirements of the 17th section, would be perfectly good though it contained a provision also for the sale of fixtures, as it would be if it contained a provision for the agistment of cattle; for work and labor; for the sale of *res incorporales;* or for any other contract not required to be evidenced in writing under the statute. And see Wick *v.* Hodgson, 12 Moore, 213, also showing that fixtures are not goods within the exemption in the Stamp Act.

[1] 1 Ex. 107.

[2] This case sustains the principle that a contract for the sale of growing grass, as well as growing timber, growing fruit, or any other growing crop, though not coming within the description of *fructus industriales,* may or may not be, according to the particular facts which show that it is or is not a contract with reference to an interest in or concerning lands, within the 4th or 17th section of the statute of frauds. Gray, of counsel for the plaintiff, contended that it was not shown by the plea that the loan was secured on an interest in land; that the term "growing crops of grass" does not necessarily imply an interest in land, and that it might mean crops of grass which are not the natural produce of the land, and which would not pass to the heir, but to the executor; or it might mean crops of grass then growing, but to be afterwards

The law is admirably summarized by Brett, J., in Marshall *v.* Green,[1] where it was held that a sale of growing timber to be taken away as soon as possible by the purchaser, is not a contract for the sale of land, or any interest therein, within the fourth section of the Statute of Frauds. The law as summarized by Brett, J., is as follows: "When the subject-matter of the contract is something affixed to land, the question is whether the contract is intended to be for the purchase of the thing affixed only, or of an interest in the land as well as the thing affixed. In the former case the contract is not within the fourth section.

cut and delivered as goods and chattels. Alderson, B., in effect assenting to this, added: "The case mentioned by Lord Abinger, in Rodwell *v.* Phillips, 9 M. & W. 505, in which a contract to sell timber growing was held not to convey any interest in the land, Smith *v.* Surman, 9 B. & C. 561, is explained by what is said by Bayley, J., in his judgment in Evans *v.* Roberts, 5 B. & C. 829; *it was in fact a contract to sell timber as a chattel.*" The ground of the decision is very plainly put by Rolfe, B., in delivering the judgment of the court: "The question is, whether the contract stated in the plea is void under the statute of Anne, notwithstanding the statute of Victoria. It certainly is void, if the plea sufficiently shows that the security consisted in part of an interest in land, for the statute of Victoria has no application to such securities. Now, part of the property assigned by way of security to the lender of the money, consisted of certain crops of grass, described in the deed as growing on a certain estate called the Sheeping-house estate, and it was argued, on the authority of Crosby *v.* Wadsworth, 6 East, 602, that this is an interest in land. When a sale of growing crops does, and when it does not, confer an interest in land, is often a question of much nicety; but certainly, when the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come merely as a personal chattel. The doubt here is, what is the true meaning of the plea as to these crops. Mr. Gray argued that the plea would be satisfied by proving that the plaintiff, not being the owner of the Sheeping-house estate, was yet entitled to the grass in question, as having purchased it on the terms that it was to be severed by the owner of the soil, and then delivered to him as a mere personal chattel; and we are inclined to attach great weight to this argument, and think the case will be in the same position as if the plea had contained no reference to the subject-matter of the security, but had merely alleged that the covenant sued on was void, as having been entered into pursuant to an usurious contract for taking more than £5 per cent. interest. Such a contract would clearly be void under the statute of Anne, and that statute being still in force, the plea is *primâ facie* a good answer to the plaintiff's demand, according to the principle laid down in Thibault *v.* Gibson, 12 M. & W. 88. The question then arises, whether the plaintiff gets rid of the effect of the statute of Anne, by merely stating that the contract was entered into after the passing of the statute of Victoria. We think he does not. The true effect of the statut of Victoria is to except from the operation of the statute of Anne all contracts not relating to land; and when the defendant has by his plea clearly brought the case within the operation of the old statute, it is not sufficient for the plaintiff to reply that which may or may not bring the contract within the operation of the statute of Victoria. It was incumbent on him to aver all which is necessary to show that the statute of Anne does not apply to the question, — namely, that it was entered into after the passing of the statute of Victoria, and that it does not relate to land. The replication does aver that the contract was after the statute of Victoria, but omits to aver that it does not relate to land. It therefore fails to show what the plaintiff was bound to make out, namely, that the statute of Anne does not apply. On these grounds, therefore, even adopting Mr. Gray's argument, as we are inclined to do, that *the plea does not show affirmatively that the security did comprise an interest in land*, still we think that the plea is good, and that the replication offers no sufficient answer."

[1] 1 C. P. Div. 35, 42.

Certain tests have been judicially agreed on with regard to this question, many if not all of which are contained in the note to Duppa *v.* Mayo,[1] in the last edition of Williams' Saunders, which has the authority of that profound lawyer, the late Sir E. V. Williams. That note gives certain tests as applicable to particular cases. Where the subject-matter of the contract is growing in the land at the time of the sale, then if by the contract the thing sold is to be delivered at once by the seller, the case is not within the section. Another case is where, although the thing may have to remain in the ground some time, it is to be delivered by the seller finally, and the purchaser is to have nothing to do with it until it is severed, and that case also is not within the section. Then there comes the class of cases where the purchaser is to take the thing away himself. In such a case, where the things are *fructus industriales*, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section. But if the thing, not being *fructus industriales*, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself." And accordingly, applying the test last mentioned, the contract being for timber trees, and the purchaser being bound to take them immediately, in Marshall *v.* Green the contract was held to be not within the fourth section of the statute.[2]

[1] Wms. Saund. p. 395. The note is as follows: "The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or *fructus industriales*, etc., the corn and other growth of the earth which are produced not spontaneously, but by labor and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods."

[2] In Liford's Case, 11 Co. 50, it was adjudged that if tenant in tail sell timber trees to another, now they are a chattel in the vendee, and his executors shall have them, and in such case *fictione juris* they

But though, as we have seen, growing crops, particularly those that are *fructus industriales*, are generally to be considered goods, wares, and merchandise, and come within the seventeenth section of the Statute of Frauds, yet they are not, absolutely, for all purposes, considered goods or chattels. Thus, though as between the executor and heir, and the executor and the remainder-man, they are personal property, and may be taken as such in execution and under a distress, they would pass by a conveyance of the land, as part of the land, without express words, and, therefore, for that purpose, they are realty, and not goods and chattels.[1]

are severed from the land; but if tenant in tail die before actual severance, as to the issue in tail they are parcel of his inheritance, and shall go with it, and the vendee can't take them, and yet *quoad* the tenant in tail himself, they were severed for a time. *Semble*, that where the tenant in fee simple sells timber trees to another, they are, at common law, as to all parties, even before the severance, chattels, and go to the executor of the vendee. Whilst timber is standing, it constitutes a part of the realty. When wrongfully severed from the soil, its character as to ownership is not changed. It continues as previously the property of the owner of the land, and can be pursued by him wherever it is carried. All the remedies are open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property. Schulenberg *v.* Harriman, 21 Wall. 44. In a New Brunswick case, Kerr *v.* Connell, Berton's R., by Dr. Stockton, 233, it was held that a license to cut and remove a certain quantity of timber from lands described in the license, does not convey an interest in lands within the statute of frauds, or give any property in standing trees.

In Webber *v.* Lee, 9 Q. B. Div. 315, it was decided that a grant of a right to shoot over land, and to take away a part of the game killed, is a grant of an interest in land, and within the 4th section of the statute. But no interest in land passes on a contract to board and lodge. Wright *v.* Stewart, 2 E. & E. 721. Nor, for the use of a dock with a vessel, where there is no exclusive possession of the dock granted, but the rights of property and possession, subject to the temporary occupation by the vessel, remain in the owners of the dock. Wells *v.* Kingston-upon-Hull, L. R. 10 C. P. 402. See Smith *v.* Overseers of St. Michael, 3 E. & E. 383; Dean *v.* Hogg, 10 Bing. 345; Watkins *v.* Overseers, L. R. 3 Q. B. 350; Roads *v.* Trumpington, L. R. 6 Q. B. 56; Wood *v.* Leadbitter, 13 M. & W. 838. And an agreement to take shares in a mine conducted on the cost-book principle, which gives the shareholder an interest in a proportionate part of the profits of the undertaking, confers no interest in the land, though the employment and use of the land are essential to the making of the profits. So in Tayler *v.* Waters, 7 Taunt. 374, the case of a box at the opera, the court held that the grant was but a right of admission to the opera house, and a license to enjoy an amusement on land, and not a grant of an interest in land.

[1] Per Brett, J., in Brantom *v.* Griffits, 1 C. P. Div. 349; at p. 354. And as the English Bills of Sale Act, 1854 (17 and 18 Vic. c. 36), defines "personal chattels" under that act, with reference to which the bills of sale must be registered, to mean "goods, furniture, fixtures, and other articles capable of complete transfer by delivery," and enacts that the personal chattels shall be deemed to be in the apparent possession of the person giving the bill of sale so long as they remain on land or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession may have been taken by or given to any other person; it was held that these words as to personal enjoyment, taken together with the expression, "capable of complete transfer by delivery," show that the act only applies to things which, at the moment when the bill of sale is given and the provisions of the act are to be applied to it, might be delivered to the assignee, and are not, but are left in the enjoyment of the assignor; and that it follows that, as growing crops are not capable of being used or enjoyed, or of being delivered at the time when the provisions of the act are said to apply to them, they are not personal chattels within its meaning. Brantom *v.* Griffits, 1 C. P. Div. 349. Affirmed, on appeal, 2 C. P. Div. 212. An Irish case to the contrary, Sheridan *v.* McCartney, 11 Ir. C. L. N. s. 506, which was doubted in Gough *v.* Everard, 2 H. & C. 1, was disapproved by

Brett, J., in Brantom *v.* Griffits, 1 C. P. Div. at p. 355. But it was held, in *Ex parte* National Bank, 16 Ch. Div. 104, affirming Brantom *v.* Griffits, that though a bill of sale under the Bills of Sale Act, 1854, does not require registration in respect of growing crops, yet when the crops are subsequently severed by the grantor, they become personal chattels, and, if possession has not been taken of them by the grantee before the commencement of proceedings in bankruptcy against the grantor, they will pass to the trustee in liquidation.

BOOK IV.

PART II.

FIXTURES.

THE cases with reference to fixtures in connection with the Statute of Frauds are not numerous. In Jevons *v.* Roberts,[1] Littledale, J., considered tenant's fixtures as being in close resemblance to those growing crops which are not the spontaneous produce of the earth, but are raised by the labor and expense of the occupier of the land.[2]

[1] 5 B. & C. 834.

[2] The position of Littledale, J., in effect, is, that that which goes to the executor, whether growing crops or fixtures, is within the 17th section of the statute; while that which goes to the heir is within the 4th section. His language is: "I think that a sale of any growing produce of the earth, reared by labor and expense, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land within the 4th section of the statute of frauds; but a contract for the sale of goods, wares, and merchandise, within the 17th section of that statute. Such an interest goes to the executor, and not to the heir, and anything which goes to the executor and not to the heir, may be taken in execution under a *fi. fa.* This is the rule of law as to tenants' fixtures, which bear a very close resemblance to those growing crops which are not the spontaneous produce of the earth, but are raised by the labor and expense of the occupier of the land. It has been held that vats, coppers, etc., set up in a house by a lessee for years in relation to his trade, may be taken in execution under a writ of *fieri facias* issued against him, Poole's Case, 1 Salk. 368; but that fixtures of a similar description cannot be taken in execution under a *fieri facias* issued against a party who was seized in fee of the house in which they were situate, upon the ground that they would go to his heir, and not to his executor. Winn *v.* Ingilby, 5 B. & Ald. 625. Now, a growing crop of corn or potatoes, or of any vegetable which is produced not spontaneously by the earth, but by the labor and expense of the occupier, goes to the executor and not to the heir of tenant in fee simple. It would seem, therefore, that such a growing crop may be seized under a *fieri facias* issued against the owner of the inheritance, as his goods and chattels, even while they are annexed to the freehold. I cannot, therefore, consider the annual produce of land which is proceeding to a state of maturity, and which, when taken at maturity, will be severed from the ground and become movable goods and chattels, as an interest in or concerning land within the meaning of the 4th section of the statute of frauds, which seems to me to mean land taken as mere land, and not its annual growing productions."

As the question as to what are fixtures, is also important under Bills of Sale Acts, and otherwise, we here set out the authorities relating thereto, at some length.

In *Ex parte* Astbury, *In re* Richards, L. R. 4 Ch. Ap. 630, an iron manufacturer made an equitable mortgage of his rolling-mills, of which he held a lease, and shortly afterwards became bankrupt. Besides the fixed machinery, the mills contained the following chattels used in the manufacture: 1. A large number of duplicate iron rolls of various sizes made to be fitted into the machine and used for different sizes of iron. Some of these were fitted to the machine and had been used, and others had not yet been fitted. 2. Straightening plates, which were broad iron plates embedded in the floor, for straightening the iron when taken out

Assumpsit was brought for goods sold and delivered, and the question was whether the plaintiff could recover under such a

of the furnace. 3. Weighing machines, which were deposited in holes dug in the earth, and lined with brick-work, so that the weighing plate was level with the surface of the ground, but which were not fixed to the brick work. It was held, on a case stated in bankruptcy between the mortgagees and the bankrupts' assignees :

First. That such of the rolls as had been fitted to the machine were fixtures, and passed to the mortgagees ; but that such of the rolls as had not been fitted to it, were not fixtures, and belonged to the assignees. *Secondly.* That the straightening plates were fixtures, and passed to the mortgagees. *Thirdly.* That the weighing machines were not fixtures, and belonged to the assignees.

As the case covers different points often occurring, with reference to the law of fixtures, we quote fully from the judgment in the case delivered by Sir G. M. Gifford, L. J., as follows : —

"The questions in cases of this description are, for the most part, much more questions of fact than of law, for to my mind the law has been settled, but the facts necessarily differ more or less in each particular case.

"With respect to the law, it is admitted that where there is a mortgage of a manufactory, and part of the machinery used in it is a fixture, that part passes. We have, therefore, to determine what, according to the law, are, in a proper sense, fixtures. There are two *dicta* which will be sufficient to guide us for the present purpose. In Mather *v.* Fraser, it was decided that the article must be an essential part of the machine. I think that was all that it was necessary to lay down in that case. The *dictum* of Lord Cottenham in Fisher *v.* Dixon (12 Cl. & F. 142), was that all 'belonging to the machine' would pass, and I should say in this case the proper test to lay down would be that the chattel must be 'something that belongs to the machine as part of it.' Now, these machines were rolling machines, and there appears to be connected with rolling machines, parts which beyond all doubts are not fixed, in the strict sense of the term ; but it is in evidence that if a machine is ordered, it is sent with one set of rolls, and it is quite manifest that without rolls the machine could not do any part of the work for which it is made. One set of rolls clearly passes. But we have here duplicate rolls ; and with reference to them, — I am not now speaking of rolls which can be considered as, in any sense, unfinished, but of duplicate rolls which have been actually fitted to the machine, — I cannot see why, if one set of rolls passes, the duplicate rolls should not pass also. It comes, in fact, to this, that the machine with one set of rolls is a perfect machine, but the machine with a duplicate set is a more perfect machine. I think, therefore, that each set of rolls necessarily belongs to the machine as part of it. I do not think that this is at all affected by the *dictum* of Fitzherbert ; but if it was, my answer would be, that this subject has been considered much more of late years than it was in olden times, and that the matter decided was with regard to a question of distress. If it were desired to reduce the question to an absurdity, it would be by supposing a case of duplicate latch-keys to a door, and holding that one only should pass, and not the other. The fact is, that whether there is one set of rolls or a duplicate set, they are each part and parcel of the machine, and come within the term 'belonging to the machine as part of it.' Then comes the case as to the different sizes of rolls. But if the duplicates of the same size pass, it follows that the rolls of different sizes pass, if they render the machine still more perfect than if the rolls were all of the same size.

"Then we come to another and different class of rolls, and there I confess I differ from the registrar who has given his opinion in this case. I allude to those rolls which had been made for the purpose of being used in this machine ; and had been sent to the mill for that purpose, but had never been fitted to the machine, and which required something more to be done to fit them to the machine in order that they might be used in it. I think that if a man mortgages a machine, and afterwards, the machine itself being perfect, and fitted with rolls, and everything else connected with it, other rolls are sent for to be used with the machine, but those rolls cannot be used unless and until they are fitted to the machine, it would be going a long way to say that the mortgagor should be compelled to fit those rolls to the machine, and should be precluded from saying that they do not form a part of the machine. Therefore, I am of the opinion that, as regards the duplicate rolls, as regards the rolls of different sizes, as regard all the rolls which have been actually fitted to the machine, they belong to the machine as part of the machine — they are, in fact, essential parts of the machine. But I cannot hold that the rolls which have never been fitted to the machine, and have never been used in the machine, and

count the value of grates and other fixtures which the plaintiff had fixed to a house in which he carried on business, to which

which require something more to be done to them before they are fitted to the machine, belong to the machine, or that they are essential parts of it. Therefore, in that respect, the order will be varied. The two points which remain to be disposed of in this question are, first, as to the straightening plates; and secondly, as to the weighing machines. I cannot agree to the suggestion of Mr. Jessel that because the mortgagor in this case was a leaseholder, and not a freeholder, the articles which are fixtures will not pass to the mortgagee. Whether he is a freeholder or a leaseholder, the same rule clearly and indubiably would apply, and the only question is, whether the straightening plates and the weighing machines are fixtures. With regard to the straightening plates, two cases were cited, one of the Metropolitan Counties Society *v.* Brown, and another of Bales *v.* Duke of Beaufort. The latter case clearly has no application, for that was a case in which, there being chattels which, as between the lessor and lessee, the lessee might remove, an execution creditor of the lessee was held entitled to take them. As regards the former case, the point was wholly different from the point in this case, because there the straightening plates certainly were not fixed in the mode in which these straightening plates appear from the evidence to be fixed. It is only necessary to read some portions of the evidence to show that these straightening plates are clearly fixtures, and, in fact, just as much part of the floor as any pavement would be; and, certainly, it would be astonishing to me if an ordinary pavement were regarded as a thing that could be removed by a mortgagor as against his mortgagee. (His Lordship then referred to the evidence, and continued:) Upon this evidence, I must assume that the plates round the straightening plates are part of the ordinary floor of the place, and that the straightening plates are just as much part of the ordinary floor as the plates around them. I look upon these straightening plates as in the same position as a flagstone laid down and set in, and certainly if anything in the world is a fixture, I should conceive that a flagstone laid down and set in would be a fixture. In fact, the registrar seems to have fallen into this mistake by laying rather too much stress on what was said in the case of Mather *v.* Fraser (2 K. & J. 536), as to nothing being a fixture which could stand by its own weight. No doubt a flat plate will rest by its own weight, but if you have it laid in, embedded, and overlaid with that which is part of the permanent floor, and the permanent floor cannot be removed without damage to the freehold, as it clearly cannot be here, I can have no doubt whatever but that the straightening plates are fixtures.

"But then, with regard to the weighing machines, I think the case is wholly different. The evidence is clear that weighing machines of this description are frequently put upon wheels, and are so used. As regards these weighing machines, it appears that where they are placed inside the building, the floor is prepared for them, and where they are placed outside, the soil is prepared for them; that is to say, a square receptacle is make and bricked, the weighing machine is placed in it, and may, of course, be taken out again, for it is not fixed by nails or by screws, or in any other way. One of the witnesses says: 'I took a piece of thin iron about half an inch thick and trickled around the outside of it, and from that I could see there was some brick-work put up in order to secure the outside; there was a space all round of from five-eighths to three-fourths of an inch.' Mr. Fry argued that the brick-work was the same thing as if there had been a frame, and that the brick-work is part and parcel of the machine. To that argument I cannot assent. Suppose in this case a number of brick places had been made, into which it had been convenient to put weights, beyond all doubt the weights would not have been fixtures. In the same way, if there had been a foundation of granite for a cannon or a large telescope, neither the cannon nor the large telescope would be a fixture. The preparation of the soil does not make the machine a fixture, nor does the fact of its being put into the receptacle so prepared for it make it a fixture." And see Metropolitan Counties' Society *v.* Brown, 26 Beav. 454; Wystow's Case, M., 14 H. 8, fo. 25 pl., 6; Place *v.* Fagg, 1 M. & Ry. 277; Fisher *v.* Dixon, 12 Cl. & F. 312; Mather *v.* Fraser, 2 K. & J. 536; Johnston *v.* Dobie, 7 Mos. Dict. of Dec. (Sc.) 5443; D'Eyncourt *v.* Gregory, L. R. 3 Eq. 382; Bates *v.* Duke of Beaufort, 8 Jur. N. S. 270; Hellawell *v.* Eastwood, 6 Ex. 295.

W., a lessee for years, demised by way of mortgage a cotton mill and all the steam-engines, mill gear, and fixed and movable machinery, to B., to hold, as to the mill and such of the machinery as was of the nature of fixtures, for the residue of the term except the last two days, and as to the movable machinery and other arti-

the defendant had succeeded, and for which fixtures the defendant was to pay. Lord Ellenborough held, that being fixed to the

cles,* absolutely. The deed contained a power of sale, by the mortgagee, of the mill and machinery, and as to the machinery, fixed and movable, either with the mill or separately. It was held that the deed, so far as it operated as a mortgage of trade fixtures, required registration under the Bills of Sale Act; and that the fact of the building and the trade fixtures being included in the same demise, made no difference. *Ex parte* Daglish. *In re* Wilde, L. R. 8 Ch. Ap. 1072. The holding in this case turns on the language of the English Bills of Sale Act (17 & 18 Vic. ch. 36), which provides in § 7, that the expression, "bill of sale," shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt; and it expressly provides that the expression, "personal chattels," shall include fixtures. See also, Begbie *v.* Fenwick, L. R. 8 Ch. Ap. 1075, *n.*; Hawtry *v.* Butlin, L. R. 8 Q. B. 290; Boyd *v.* Sherrock, L. R. 5 Eq. 72 (considered *infra*); Climie *v.* Wood, L. R. 4 Ex. 328; Longbotham *v.* Berry, L. R. 5 Q. B. 123; Holland *v.* Hodgson, L. R. 7 C. P. 328; *Ex parte* Barclay, 5 DeG. M. & G. 403; Waterfall *v.* Penistone, 6 E. & B. 876; Cullwick *v.* Swindell, L. R. 3 Eq. 249.

In D'Eyncourt *v.* Gregory, L. R. 3 Eq. 382, the question arose as to what were fixtures under a will where there was a bequest, on a condition not being fulfilled, of all the tapestry, marbles, statues, and pictures, with their frames and glasses, which at the time of his death, should be in or about a mansion house, which the testator had erected, fitted up, and furnished. Lord Romilly confessed that he felt very considerable difficulty in deciding as to which of the articles which were more or less closely attached to the house were, and which were not, removable. The principle upon which he decided was, that in all these cases the question is not whether the thing itself is easily removable, but whether it is essentially a part of the building itself from which it is proposed to remove it; as in the familiar instance of the grinding-stone of a flour mill, which is easily removable, but which is, nevertheless, a part of the mill itself, and goes to the heir, and not to the legal personal representative. It was, therefore, held that tapestry, pictures in panels, frames filled with satin, and attached to the walls, and also statues, figures, vases, and stone garden-seats, purchased and placed by the testator, which were essentially part of the house, or of the architectural design of the building or grounds, however fastened, were fixtures, and could not be removed. But that glasses and pictures not in panels, not being part of the building, though attached to it by nails and screws, passed under the testator's will, as did also other chattels of the testator, including tapestry, which another than the legatee had attached to the building after the death of the testator. The great difficulty was found with reference to the articles of ornament which were not attached to the freehold by any fastenings; but these, though articles of ornament, were considered as belonging to an architectural design, and forming part of the design itself, and, like the stone of a mill, which is part of the mill itself, go to the heir-at-law. It was admitted that the distinction was extremely thin as between articles of ornament which did or did not form part of the architectural design, and that in many cases it would be difficult to distinguish between them unless it were done in an arbitrary manner; so closely might one run into the other. But the court was unable to suggest any other mode by which the true construction could be defined more accurately than that stated. Accordingly, evidence must in every case determine whether the article falls within or without the line. See Lawton *v.* Lawton, 3 Atk. 13, Lord Dudley *v.* Lord Warde, Amb. 113; Squier *v.* Mayer, 2 Freem. 249; Harvey *v.* Harvey, 2 Str. 1141; Cave *v.* Cave, 2 Vern. 508; Hutchinson *v.* Kay, 23 Beav. 413; Horn *v.* Baker, 9 East, 215; Elliott *v.* Bishop, 10 Ex. 496; Bishop *v.* Elliott, 11 Ex. 113; Wiltshear *v.* Cottrell, 1 E. & B. 674; Wood *v.* Hewitt, 15 L. J. Q. B. 247; Mant *v.* Collins, cited *Ibid.*; Patton *v.* Sheppard, 10 Sim. 186.

It has been held that looms put up by the lessee of a cotton mill for his convenience during the existence of his term, and fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the floor, are, though easily movable without injury to the freehold, fixtures which will pass under an assignment of "the mill, fixed machinery, and hereditaments, with all looms and other machinery, fixed or movable," without the necessity of registering the assignment as an assignment of chattels under the Bills of Sale Act, 17 & 18 Vic. c. 36. Boyd *v.* Sherrock, L. R. 5 Eq. 72.

Following the decisions in *Ex parte* Barclay, 5 De G. M. & G. 403, and

freehold, and not a separate and undivided chattel, they could not

Mather *v.* Fraser, 2 K. & J. 536, the principle on which this case seems to have been decided, is that, if the tenant has affixed to the freehold articles, in such a manner as to make it appear that, during the term, they are not to be removed, and that he regards them as attached to the property, according to his interest in the property, then, on any dealing by him with the property to which these articles are affixed, the court would presume that he meant to deal with the property as it stood, with all these things so attached, and to pass the property in its then condition. Such a principle is, obviously, very unsatisfactory; leaving, as it does, the same articles, affixed in precisely the same manner, to be considered as fixtures passing with the freehold, or not, according to a rule almost incapable of any reasonable application. The attempted application in the judgment in this case, of the principle named (see p. 79), is so thoroughly unsatisfactory as to demonstrate the utter impracticability of the principle relied on. The decision has not met with approval, even on the main point it decides. It was dissented from by Malins, V. C., in Begbie *v.* Fenwick, L. R. 8 Ch. 1075, *n.*; also in substance, by Blackburn and Mellor, JJ., in Hawtry *v.* Butlin, L. R. 8 Q. B. 290; and again expressly, by Mellish, L. J., in *Ex parte* Daglish, L. R. 8 Ch. at p. 1083. See further, Haley *v.* Hammersley, 3 De G. F. & J. 587, and the cases cited in the above notes.

A tramway in a quarry, and a steam crane, cramped on to large stones, and kept in position by two guys, were held to be, with the guys as well, fixtures passing under a mortgage which did not require to be registered as a sale of personal chattels under the English Bills of Sale Act, either of 1854 or 1878. *Ex parte* Moore & Robinson's Banking Company, *In re* Armytage, 14 Ch. D. 379. The 4th section of the Act of 1878 enacts that the expression, "bills of sale," shall include bills of sale, assignments, and a great variety of other instruments there mentioned; and shall not include certain other instruments. The paragraph which defines personal chattels is as follows: "The expression, 'personal chattels,' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed." See further, as to the construction of these acts, Mather *v.* Fraser, 2 K. & J. 536; Longbottom *v.* Berry, L. R. 5 Q. B. 123; Holland *v.* Hodgson, L. R. 7 C. P. 328; Turner *v.* Cameron, L. R. 5 Q. B. 306; Begbie *v.* Fenwick, L. R. 8 Ch. 1075, *n.*; Waterfall *v.* Penistone, 6 E. & B. 876; *Ex parte* Barclay, L. R. 9 Ch. 576; *Ex parte* Daglish, L. R. 8 Ch. 1072; Duke of Beaufort *v.* Bates, 31 L. J. Ch. 481; Turner *v.* Cameron, L. R. 5 Q. B. 306; *Ex parte* Astbury, L. R. 4 Ch. 630; *Ex parte* Tweedy, 5 Ch. Div. 559.

The owner in fee in possession of land and premises deposited the title-deeds with a banking company as an equitable mortgage, to secure the balance of his account with them for the time being. He then erected a mill, and set up, not only steam power applicable to all mills, but machinery applicable only to the purposes of a particular manufacture which he carried on there. He afterwards made a bill of sale of all the machinery, the assignee having notice of the previous deposit of the deeds. Held, as between the mortgagees and assignee, that all of the machinery which was annexed to the floor, ceilings, or sides of the building, in a "*quasi* permanent manner," by means of bolts and screws, passed to the mortgagees; and that it made no difference that the object of the annexation was merely to steady the machines when in use, and that they could be removed without any injury to them or the freehold, nor that the machines were in the nature of trade fixtures, which would, as between landlord and tenant, belong to the tenant. Longbottom *v.* Berry, L. R. 5 Q. B. 123.

The case of Boyd *v.* Shorrock, L. R. 5 Eq. 72 (*supra*), was disapproved in Hawtry *v.* Butlin, L. R. 8 Q. B. 290; which the court in this case refused to follow. The facts in Hawtry *v.* Butlin, were that H., a lessee for years, demised, by indenture of mortgage to the plaintiffs, certain buildings used as an iron factory, for the residue of the term, except the last two days, and by the same indenture, he also assigned to the plaintiffs all the machinery, plant, fixtures, implements, utensils, and effects, then or thereafter to be fixed to or used in or about the buildings, subject to redemption on payment of the mortgage money and interest. This mortgage was not registered under the Bills of Sale Act. The fixed machinery, plant, and fixtures assigned, were such articles as are known as trade fixtures. While in the apparent possession of H., they were seized by the sheriff under a *fi. fa.*, at the suit of the defendants. The plaintiffs claimed

come under the description of goods sold and delivered.[1] So, in the articles under their mortgage, and the question between them and the defendants was brought before the Court of Queen's Bench on a special case stated. The court held that the assignment was of personal chattels within the Bills of Sale Act, and required registration. The distinction made in the case is as between a conveyance by vendor and vendee, or mortgagor and mortgagee in fee, where the fixtures would pass with the land; and an underlease by a tenant, where the trade fixtures would not pass with the land. In the former case, registration under the Bills of Sale Act would not be required; in the latter, it would be. Begbie *v.* Fenwick, L. J. N. S. 58, was followed.

In Holland *v.* Hodgson, L. R. 7 C. P. 328, 334, where the mortgage was in fee with the fixtures attached, the court said: "If a tenant having only a limited interest in the land, and an absolute interest in the fixtures, were to convey not only his limited interest in the land, and his right to enjoy the fixtures during the term, so long as they continued a part of the land, but also his power to sever those fixtures and dispose of them absolutely, a very different question would have to be considered. As it does not arise, we decide nothing as to this. We are not to be understood as expressing dissent from what appears to have been the opinion of Wood, V. C., in Boyd *v.* Shorrock, L. R. 5 Eq. 72, but merely guarding against being supposed to confirm it."

In Climie *v.* Wood, L. R. 3 Ex. 257, on the trial before Pigott, B., the jury, in reference to an engine and boiler, on questions submitted to them, found that the articles were trade fixtures, and were fixed for the better use of them, and not to improve the inheritance; that they were removable without any appreciable damage to the freehold, and that they had been sold *bonâ fide*. In an action between the purchaser (the plaintiff), and the mortgagee (the defendant), the jury found for the plaintiff. On motion to enter the verdict for the defendant, the Court of Exchequer held, following Cullwick *v.* Swindell, L. R. 3 Eq. 249, that trade fixtures which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which are capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold to the mortgagee. This decision, on appeal to the Exchequer Chamber, was affirmed. Climie *v.* Wood, L. R. 4 Ex. 328. See Hellawell *v.* Eastwood, 6 Ex. 295; Walmsley *v.* Milne, 7 C. B. N. S. 115; Waterfall *v.* Penistone, 6 E. & B. 876; Reg. *v.* Inhabitants of Lee L. R. 1 Q. B. 253; Lancaster *v.* Eve, 5 C. B. N. S. 717; Parsons *v.* Hurd, 14 W. Rep. 860; Place *v.* Fagg, 4 M. & R. 277; *Ex parte* Cotton, 2 M. D. & De G. 725; Sumner *v.* Bromilow, 34 L. J. Q. B. 130; Trappes *v.* Harter, 3 C. & M. 153; Wood *v.* Hewett, 8 Q. B. 913; Mant *v.* Collins, cited 8 Q. B. 916; Lawton *v.* Lawton, 3 Atk. 13; *Ex parte* Quincey, 1 Atk. 477; Lawton *v.* Salmon, 1 H. Bl. 259, n.; Dudley *v.* Warde, Amb. 113; *Ex parte* Barclay, 5 De G. M. & G. 403; *Ex parte* Belcher, 2 Mont. & A. 160.

A wheel factory, including the machinery and gear, was mortgaged to the plaintiffs. The deed of mortgage was not registered as a bill of sale. Leather driving-belts were used in working the machinery at the factory. They were used for driving certain wheels or drums, by passing over the wheels or drums on different shafts, and could be removed at pleasure when the machinery was thrown out of gear. They were held to be necessary parts of the machinery, and passed (reversing the judgment of Field, J.) under the mortgage as not being chattels under the Bills of Sale Acts. Sheffield, &c. Permanent Building Society *v.* Harrison, 15 Q. B. Div. 358. In this case, Longbottom *v.* Berry, L. R. 5 Q. B. 123, was approved and followed. Holland *v.* Hodgson, L. R. 7 Q. B. 328, stated *infra*, is to the same effect.

Where a mortgagor in possession of premises lets them to a tenant who brings on to them trade fixtures, the fixtures do not pass under the mortgage, but remain the property of the tenant. Sanders *v.* Davis, 15 Q. B. Div. 218. The question in this case was considered one of first instance. The ground upon which the case rests, is, that the mortgagee allowed the mortgagor to remain in possession, and to let the premises. If the mortgagee had let the premises himself, he could not have taken the fixtures. There is no reason why he should be in a better position, because, although he did not himself let the premises, he allowed the mortgagor to do so. It is equitable that, under these circumstances, the tenant should be in the

[1] Nutt *v.* Butler, 5 Esp. 176. And see Elwes *v.* Maw, 3 East, 38; Cave *v.* Cave, 2 Vern. 508; Lawton *v.* Lawton, 3 Atk. 13; Beck *v.* Rebow, 1 P. Wms. 94; Dean *v.* Allalley, 3 Esp. 11; Penton *v.* Robart, 2 East. 88. And see Horn *v.* Baker, 9 East, 215, as to reputed ownership under 21 Jac. 1.

Lee *v.* Risdon,[1] it was also held that the price of fixtures to a same position as if the mortgagee was his landlord. See Cullwick *v.* Swindell, L. R. 3 Eq 249; Meux *v.* Jacobs, L. R. 7 H. L. 481; *In re* Cotton, 2 M. D. & De G. 725. As a general rule, the mortgage of premises will pass the fixtures upon the premises. A mortgage of a lease made by the lessee will carry the fixtures of the property which is in lease, and the power to remove which fixtures was in the tenant. Fixtures attached by the mortgagor to the property after the date of the mortgage, will also, unless under special stipulations, pass to the mortgagee. There is no difference in this respect between a mortgage in fee by a freeholder, and a mortgage by way of assignment of a term by a leaseholder. A. was the lessee of a public house. On obtaining, in 1869, from M. a loan of £800, he deposited the lease with M., together with a memorandum reciting that it was deposited as security for the loan, and for any money that might become due to M. for goods sold, and for the expense of "insuring the premises and the fixtures and fittings therein" from fire, and the memorandum also contained an undertaking to execute, when required, a legal mortgage. In April, 1873, A. borrowed a sum of £55 from J., and gave J. a bill of sale of the fixtures and fittings. J. afterwards put a man in possession and advertised the fittings for sale. M. thereupon filed a bill to restrain the sale. It was held that the equitable mortgage effected in 1869 passed the fixtures and fittings, and did not require registration under the Bills of Sale Act (17 & 18 Vic. c. 36) to give it effect as to them. Meux *v.* Jacobs, L. R. 7 H. L. 481. In Longbottom *v.* Berry, L. R. 5 Q. B. 123, the owner in fee in possession of land and premises, deposited the title-deeds with a banking company, as an equitable mortgage, to secure the balance of his account with them for the time being. He then erected a mill, and set up not only steam power applicable to all mills, but machinery applicable only to the purposes of a particular manufacture which he carried on there. He afterwards made a bill of sale of all the machinery, the assignee having notice of the previous deposit of the deeds. It was held that, as between the mortgagees and assignee, all of the machinery which was annexed to the floor, ceilings, or sides of the building, in a "*quasi* permanent manner," by means of bolts and screws, passed to the mortgagees; and that it made no difference that the object of the annexation was merely to steady the machines when in use, and that they could be removed without any injury to them or the freehold, nor that the machines were in the nature of trade fixtures, which would, as between landlord and tenant, belong to the tenant. Mather *v.* Fraser, 1 Kay & J. 536, is to the same effect, as is, also, *Ex parte* Barclay, 5 De G. M. & G. 403. These cases were followed in Holland *v.* Hodgson, L. R. 7 C. P. 328. There the owner in fee of a worsted mill, at which he carried on the business of a worsted spinner and stuff manufacturer, mortgaged it to the plaintiffs. By a deed of arrangement, under the Bankruptcy Act, 1861, subsequently executed, the mortgagor assigned all his property to the defendants, as trustees, for the benefit of his creditors. Under the latter deed, the defendants seized certain looms which were in the mill that was mortgaged. These looms were attached to the stone floors of the mill by means of nails driven through holes in the feet of the looms; in some cases into beams which had been built into the stone, and in other cases into plugs of wood driven into holes drilled in the stone for the purpose. It was necessary that the looms should be so attached for the purpose of steadying them and keeping them in a true direction, perpendicular to the line of the shafting, by means of which the steam power was applied to them. It was impossible to remove the looms without drawing the nails; but this could be done easily and without any serious damage to the flooring. The plaintiffs brought trover for the looms. It was held, affirming the decision of the court below, that the looms passed by the mortgage of the mill as part of the realty, and the action was therefore maintainable. And see Wilde *v.* Waters, 16 C. B. 637; Wiltshear *v.* Cotterill, 1 E. & B. 674; Walmsley *v.* Milne, 7 C. B. N. S. 115; *In re* Dawson, Ir. L. R. 2 Eq. 222; Haley *v.* Hammersley, 3 De G. F. & J. 587; Hallen *v.* Runder, 1 C. M. & R. 266; Trappes *v.* Harter, 2 C. & M. 153; Wood *v.* Hewett, 8 Q. B. 913; Fisher *v.* Dixon, 12 Cl. & F. 312; Gibson *v.* Hammersmith Ry. Co., 2 Dr. & P. 603; Martin *v.* Roe, 7 E. & B. 237.

On the principle that the law as to fixtures was much more liberal as regards erections for the purpose of carrying on trade than under any other circumstances, the Supreme Court of the United States, in Van Ness *v.* Pacard, 2 Peters, 137, held that buildings erected by the defendant, a tenant, on land in Washington, for the purposes of his business as a dairyman,

[1] 7 Taunt. 188.

house cannot be recovered under a declaration for goods sold and

and removed by him before the expiration of his lease, were properly removable. The buildings consisted of a wooden dwelling-house, two stories high in front, with a shed of one story; a cellar of stone or brick foundation, and a brick chimney; and of a stable for cows, of plank and timber, fixed upon posts fastened into the ground. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took down the house and stable and removed the materials from the lot. The defendant was a carpenter by trade, and he gave evidence that, upon obtaining the lease, he erected the house with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in the business; and that the cellar, in which there was a spring, was made and exclusively used for a milk-cellar, in which the utensils of his business were kept and scalded, and washed and used; that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family; and that the defendant had his tools as a carpenter, and two apprentices in the house, and a work-bench out of doors; and carpenters' work was done in the house, which was in a rough and unfinished state, and made partly of old materials. As the case carries the doctrine to its extreme limit, we quote from the judgment to show the full extent to which it was the design of the court to carry the case. The judgment was delivered by Story, J.: "It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the court, where a large house has been built and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage or a soap boilery of one or two stories high, and on whatever foundations he may choose. In Lawton *v.* Lawton (3 Atk. 13), Lord Hardwicke said, as we have already seen, that it made no difference whether the shed of the engine be made of brick or stone. In Penton *v.* Robart (2 East, 88), the building had a brick foundation, let into the ground with a chimney belonging to it, upon which there was a superstructure of wood. Yet the court thought the building removable. In Elwes *v.* Maw (3 East, 38), Lord Ellenborough expressly stated that there was no difference between the building covering any fixed engine, utensils, and the latter. The only point is, whether it is accessory to carrying on the trade or not. If *bonâ fide* intended for this purpose, it falls within the exception in favor of trade. The case of the Dutch barns before Lord Kenyon (Dean *v.* Allalley, 3 Esp. 11; Woodfall's Landlord and Tenant, 219) is to the same effect. Then, as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now, what was the evidence in the present case? It was, 'that the defendant erected the building before mentioned with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business.' The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade. Surely it cannot be doubted that in a business of this nature the immediate presence of the family and servants was or might be of very great utility and importance. The defendant was also a carpenter, and carried on his business as such in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and unless we were prepared to say, which we are not, that the mere fact that the house was used for a dwelling-house as well as for a trade, superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron Comyns and Lord Hardwicke, and, therefore, entitled to the benefit of the exception. The case of Holmes *v.* Tremper (20 Johns. 29) proceeds upon principles equally liberal; and it is quite certain that the Supreme Court of New York

delivered.[1] This was the case where the seller was the owner of the house, and the purchaser was the incoming tenant. But in

were not prepared at that time to adopt the doctrine of Elwes *v.* Maw, in respect to erections for agricultural purposes." We think the Circuit Court was right in refusing the first instruction, viz., that, on the facts named, the defendant was not justified in removing the buildings from the premises.

The doctrine concerning tenants' fixtures, which is a strong innovation upon the common-law rule that all buildings become a part of the freehold as soon as they are placed upon the soil, has extended no further than the right of removal while the tenant is in possession, and has never been held to give a right of action against the landlord for their value. It was therefore held, that where the contract in the lease gave the landlord the option of renewal or payment for improvements at the termination of the lease, this did not apply where the tenant was ejected for non-payment of the rent before the lease had determined. Kutter *v.* Smith, 2 Wall. 491. The right to such payment was not covered by the contract.

On the question of rolling stock as a fixture, see the reporter's note to Minnesota Co. *v.* St. Paul Co., 2 Wall. 609, 645. The distinction to which reference is there made between rolling stock of a railway as a "fixture" and as an "accessory," is no finer than the distinction between a "sale" and a "barter." The language used as regards rolling stock, slightly altered, is equally as applicable to many transactions which might be called "barter:" "If they must not be *called* 'fixtures' [sales], in deference to the old cases, they are yet of that sort of accessories [barter] which has every element of a fixture [sale], and to be regarded accordingly, however named."

Under an act which declares that certain bonds issued by a railroad company constitute a first lien and mortgage upon the road and *property* of the company, it was held that this gave a lien on the lands which had been granted to the railway company. Wilson *v.* Boyce, 92 U. S. 320.

The rule of giving priority to the last creditor for aiding to conserve the thing, has never been introduced into the laws of this country, except in maritime cases, which stand on a particular reason. Such a principle has no application to railroads. With them the general principle of the common law applies, that whatever is affixed to the freehold becomes, as a general rule, part of the realty; and this applies to rails as they are laid on the road, of which they become a part, and come within the purview of a mortgage on the road by the company. Galveston R. R. Co. *v.* Cowdrey, 11 Wall. 459.

In Hyatt *v.* Vincennes National Bank, 113 U. S. 408, it was held that, under the statutes of Indiana, the sale, under an execution, of machinery, buildings, fixtures, and improvements, including an engine, boiler, hoisting machine, railroad scales, wagon scales, screens, etc., was properly made as real estate, and not as personal property; as, for the purposes of a sale on execution, the articles, being chattels real, had, by the statutes, the character of real estate impressed on them, and, therefore, were not required to be sold as personal property, but as real estate.

[1] The right between landlord and tenant does not altogether depend upon the principle that the articles continue in the state of chattels. Many articles, though originally goods and chattels, yet when affixed by a tenant to the freehold, cease to be goods and chattels by becoming part of the freehold. And though in the tenant's power to reduce them to the state of goods and chattels again by severing them during his term, yet until they are severed they are a part of the freehold, as wainscots screwed to the wall, trees in a nursery ground, which when severed are chattels, but standing, are part of the freehold. And unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it. And trover cannot afterwards be brought; nor can felony be committed of these things; for if a thief severs a copper and instantly carries it off, it is no felony at common law. If, indeed, he lets it remain after it is severed any time, then the removal of it becomes a felony, if he comes back and takes it; and so of a tree which has been some time severed. *Per* Gibbs, C. J., in Lee *v.* Risdon, 7 Taunt. at p. 191. But in Pitt *v.* Shew, 4 B. & Ald. 206, where the declaration was in *trespass* for breaking and entering plaintiff's dwelling-house, and for taking divers goods, chattels, and effects, it was held that as fixtures might be taken in execution under a *fieri facias*, which contains similar words, the value of the fixtures might be recovered under the terms mentioned in the declaration of "goods, chattels, and effects." And see Boydell *v.* McMichael, 1 C. M. & R. 177, 179, and Horsfall *v.* Hey, 2 Ex. 778, 782, showing that trespass *de bonis asportatis* will lie against a stranger for removing fixtures.

Hallen *v.* Runder,[1] A., having occupied a house as tenant to B., in which there were certain fixtures which A. had purchased on entering the house, and which he had a right to remove during his tenancy, agreed, at B.'s request, a few days before the expiration of his tenancy, to forbear to remove the fixtures, B. agreeing to take them at a valuation to be made by two brokers. A., at the expiration of his tenancy, delivered up possession of the house to B., leaving the fixtures on the premises. The court held that *indebitatus assumpsit* for fixtures bargained and sold would lie, and that the contract was not within the fourth section of the statute. The case followed Mayfield *v.* Wadsley,[2] where *indebitatus assumpsit* for crops of wheat, hay, and corn, was sustained.[3] In Lee *v.* Gaskell[4] it was expressly held, as it was in effect held in Hallen *v.* Runder,[5] that a contract for fixtures would not come within the seventeenth section of the statute. So that a sale of fixtures unsevered is neither within the fourth nor the seventeenth section of the statute. In the case of the sale to a third party of fixtures prior to the severance, therefore, that which in effect is sold is a license to the vendee to enter and remove for his own use and purpose, the fixtures during the term.[6] But, on principle, and

[1] 7 C. M. & R. 266.

[2] 3 B. & C. 357.

[3] See also Crosby *v.* Wadsworth, 6 East, 602; Parker *v.* Staniland, 11 East, 362; Poulter *v.* Killingbeck, 1 B. & P. 397.

[4] 1 Q. B. Div. 700; 24 W. R. 824.

[5] 1 C. M. & R. 266.

[6] Yet, while this is true, as it is, for instance, where there is a present sale of *fructus industriales*, to be subsequently severed and removed by the vendee, which conveys, not an interest in the land, but merely implies a license to go on the premises and cut and remove the growing crop; yet there may be, by virtue of the sale, an immediate property vested in the vendee, so that any loss of the subject might fall on him. Thus, in Thompson *v.* Pettitt, 10 Q. B. 101, by agreement, reciting, as the fact was, that plaintiff had discounted a bill for S., and that S., in consideration thereof, had deposited with plaintiff as collateral security for repayment the lease of his house, and had also assigned to him the fixtures as *per* inventory, S. undertook, if the bill should be dishonored, to execute a mortgage to plaintiff of the lease (such mortgage to contain the usual power of immediate sale), together with the fixtures as *per* inventory, such lease and fixtures to be sold by auction or otherwise, and after repayment of debt and expenses to plaintiff the balance to be paid over to S. But if plaintiff should wish to sell the fixtures by auction or otherwise, S. undertook to allow him to do so on the premises, without his being liable to an action of trespass. S. also undertook to pay all arrears of rent and taxes within three months; and in default of such payment authorized plaintiff to sell the lease and fixtures on the premises by auction or otherwise, without previous mortgage, and to pay the proceeds as before stated. S. signed a receipt for £80 as paid for purchase of the fixtures. S. became bankrupt, having continued in possession of the house and fixtures until that event, and the bill having then three weeks to run. The assignees took possession of the fixtures and sold them. The court held that the effect of the document was to pass an immediate interest in the fixtures, the clause empowering the mortgagee to enter on the premises for the purpose of selling the fixtures without being liable to an action of trespass plainly contemplating the property in the fixtures passing to S., while the legal interest in the house still remained in the bankrupt; and that the assignees were liable in trespass to S. for the value of the fixtures. In Nisbet *v.* Smith, 4 T. R. 504, where the action was replevin for taking *goods and chattels*, to wit, a lime-kiln, with an avowry for rent, the plea in bar that the lime-kiln was affixed to the freehold was held to be a departure, for that the declaration treating the lime-kiln as a chattel might have been true, because lime might be burnt in a

analogy, a sale of fixtures prior to severance, *to be removed by the vendor* and delivered to the vendee as chattels, would be similar to the sale of an unfinished chattel, to be subsequently completed, and delivered by the vendor to the vendee after completion, and we should say would come equally within the seventeenth section of the statute, and would, also, be in close analogy to the case of the sale of the entire produce of land, to be subsequently severed by the vendor and delivered by him to the vendee as chattels, which, as we have seen,[1] is clearly within the seventeenth section of the statute.[2]

portable oven, and the kiln need not, therefore, necessarily be affixed to the freehold; but that, as the plea in bar stated it to be affixed to the freehold, it was inconsistent with the declaration.

In Minshall *v.* Lloyd, 2 M. & W. 450, 459, Parke, B., says: "The law is clearly settled by the cases of Lee *v.* Risdon, 7 Taunt. 191, and Hallen *v.* Runder, 1 C. M. & R. 266, that everything substantially and permanently affixed to the soil is a fixture. The principle of law is that *quicquid solo plantatur solo cedit*. The right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures. That right of the tenant enables the sheriff to take them under a writ for the benefit of the tenant's creditors. I assent to the doctrine of Coombes *v.* Beaumont, 5 B. & Ad. 72, and Boydell *v.* McMichael, 1 C. M. & R. 177, that such fixtures are not goods and chattels within the bankrupt law, though they are goods and chattels when made such by the tenant's severance or for the benefit of execution creditors." This is the established law from the very earliest times. See the authorities cited in Poole's Case, 1 Salk. 368. And see Mackintosh *v.* Trotter, 3 M. & W. 184; Tripp *v.* Armitage, 4 M. & W. 687; Dunerque *v.* Rumsey, 2 H. & C. 777; Barrett *v.* Lucas, 5 Ir. R. C. L. 140.

[1] *Supra*, p. 224 *et seq.*

[2] Lee *v.* Gaskell, 24 W. R. 824; 1 Q. B. Div. 700, was an action for the price of gas-fittings. At the trial before Brett, J., it appeared that two persons named Scott and Wilson had been joint-tenants of the defendant of a house under a lease, of which seven years remained to run. By an arrangement between Scott and Wilson all the fixtures in the house became the property of Scott. He became bankrupt, and his trustee took possession of his effects, among which were the gas-fittings (the price of which was the subject of the action) fixed for use in the house in the ordinary way. The trustee sold them to the plaintiff, and informed him that, as he meant to disclaim the lease, they must be removed at once. The trustee disclaimed, but Wilson's interest in the lease continued. The plaintiff did not remove the gas-fittings, but sold them for £11 8s. to the defendant, the landlord, who never took possession of them, and repudiated the sale. The jury found that there was a parol contract between the plaintiff and defendant, and gave a verdict. The judge, however, directed the verdict to be entered for the defendant, on the ground that the sale came within the 17th section of the statute. The Queen's Bench Division, however, reversed the decision, Cockburn, C. J., in delivering the judgment, saying: "I think the case of Hallen *v.* Runder, 1 C. M. & R. 266, is directly in point, and is an authority, of course, binding upon us here. But on principle I think Hallen *v.* Runder was quite rightly decided. Fixtures are, as long as they are unsevered, part of the freehold, and in disposing of them to the landlord or any one else you cannot treat them as chattels, because they are not chattels. And in Hallen *v.* Runder it was quite rightly decided that you could not bring an action for the price of fixtures as for goods sold and delivered, because they are not goods. All you can do with regard to fixtures is to make a bargain and sale of them as fixtures, subject to the right of the tenant to remove them on the one hand, and to the liability to lose them if he does not on the other. That is so in the case of a sale to third persons, and it is the same in the case of a sale to the landlord. There is an analogy, but I think a remote one, to growing crops; but there is an obvious distinction between the two things, the latter being sown for the very purpose, when they are at maturity, of being removed; whereas the very contrary is the case with regard to fixtures. However, it is enough to say that Hallen *v.* Runder is in point."

BOOK IV.

PART III.

WORK AND LABOR.

CONTRACTS for work and labor are not within the seventeenth section of the statute. It is often a matter of difficulty to decide whether the contract is for work and labor or for goods sold, and the cases are considered as being involved in some confusion,[1] and the rule to be deduced from them one of uncertainty.

The question arose in Atkinson *v.* Bell,[2] although not under the Statute of Frauds. The action was assumpsit for goods sold and delivered, goods bargained and sold, work and labor, and materials found and provided. The facts were that A., having a patent for certain spinning machinery, received an order from B. to have some spinning frames made for him. A. employed C. to make the machines for B., and informed the latter that he had so done. After the machines had been completed, A. ordered them to be altered. They were afterwards completed according to this new order, and packed up in boxes for B., and C. informed B. that they were ready, but he refused to accept them. A nonsuit was granted on the ground that the action was not maintainable, because the property in the frames had never vested in the defendants. A rule *nisi* having been granted, pursuant to leave reserved, it was claimed that as soon as specific goods have been selected by the vendor, and accepted by the vendee, and everything has been done to vest the property, the action for goods bargained and sold would lie, but not till then; and that the action should have been in special assumpsit for not accepting. And, secondly, that the count for work and labor would not lie; for that that count is applicable to those cases only in which the work is done for the defendant, and not upon the plaintiff's own account, in working up his own materials into machines, which, when completed and accepted, and not until then, could be the property of the defendants. The court held that the action should have been special for not accepting, and sustained the nonsuit.[3]

[1] See Benjamin on Sales, § 94 *et seq.*

[2] 8 B. & C. 277.

[3] Bayley, J., said: "If the declaration had contained a count for not accepting

A similar question, under a different state of facts, came up in Grafton *v.* Armitage.[1] A. was employed by B. to devise a method of curving metal tubing for the purpose of manufacturing life-buoys, of which B. was patentee. It was held, that A. might recover compensation for the labor and skill, and also the value of the materials employed by him in the course of the work, under a count for work and labor and materials. The plaintiff relied on Clark *v.* Mumford,[2] where, in an action in *indebitatus assumpsit* for work, labor, and materials, it was held by Lord Ellenborough, that, under such a count, the plaintiff could recover for attendances as a farrier, and for medicines administered in the cure of the defendant's horses. In Grafton *v.* Armitage, Atkinson *v.*

the machines, the plaintiff might have been entitled to recover. But I cannot say that the property passed to the defendants, so as to enable the plaintiff to recover on the counts for goods bargained and sold, or for work and labor. It is said, that there was an appropriation of these specific machines by the maker, and that the property thereby vested in the defendants. I think it did not pass. Where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order, until the thing ordered is completed. And although while the goods are in progress the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are delivered. . . . If in this case an execution had issued against the maker, the sheriff might have seized the machines. They were the maker's goods, although they were intended for the defendants, and he had written to tell them so. If they had expressed their assent, then this case would have been within Rohde *v.* Thwaites, 6 B. & C. 388, and there would have been a complete appropriation vesting the property in the defendants. But there was not any such assent to the appropriation made by the maker, and therefore no action for goods bargained and sold was maintainable. Then as to the count for work and labor, if you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request on your materials, he may maintain action against you for work and labor. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labor and materials to another person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered; or if the employer refuses to accept, a special action on the case for such refusal. But he cannot maintain an action for work and labor, because his labor was bestowed on his own materials, and for himself and not for the person who employed him." Holroyd and Littledale, JJ., delivered judgments virtually to the same effect. The latter said: "Goods bargained and sold will not lie unless there be a sale. There could not be any sale in this case, unless there was an assent by the defendants to take the articles. Here there was no assent. The property must be changed, to make the action maintainable. If the property had been changed, the maker could not have delivered these machines to any one but the defendants. I think, however, he might have delivered them to another, notwithstanding anything that has passed, and that the defendants could not have maintained trover against the party to whom they were delivered. In the case of an execution or a bankruptcy, these machines must have been treated as the goods of the maker. As to the count for work and labor and materials, the labor was bestowed, and the materials were found, for the purpose of ultimately effecting a sale, and if that purpose was never completed, the contract was not executed, and then work and labor will not lie. The work and labor and the materials were for the benefit of the machine-maker, and not for the defendants."

[1] 2 C. B. 336.

[2] 3 Camp. 37.

Bell was distinguished, on the ground that there the substance of the contract was goods to be sold and delivered by the one party to the other, while in Grafton *v.* Armitage there never was any intention to make any thing which could properly become the subject of an action for goods sold and delivered. The plaintiff was applied to, to point out the proper mode of attaining a given object, and the court held that he was as much entitled to recover in respect of the application of his skill and scientific knowledge, as he would have been for mere manual work and labor.[1]

Atkinson *v.* Bell[2] is also distinguished in Wilkins *v.* Bromhead.[3] Here, A. employed B. to build him a greenhouse for £50. When it was completed, B. gave A. notice, and requested him to remit the price. A. remitted the amount, and desired B. to keep the greenhouse till sent for. Afterwards B. (unknown to A.) deposited the greenhouse with C., telling him it was the property of A., and requesting him to keep it for A., which he agreed to do. B. having become bankrupt, his assignees took possession of the greenhouse. The court held, that the property in the greenhouse passed to A., there having been an appropriation of it to him by B., and an assent to such appropriation, and that trover for the greenhouse would lie against the assignees.[4]

[1] Coltman, J., in Grafton *v.* Armitage, said: "Atkinson *v.* Bell is clearly distinguishable from the present case. The order there was for two spinning-frames to be made for the defendants; and, though the mere undertaking of the maker to make two spinning-frames in pursuance of that order, did not vest in them the property in the identical frames when completed, in the absence of any assent on their part to the appropriation, still the contract was not a contract for work and labor. The claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work and labor bestowed by him in the fabrication of them. So, here, if this had been a contract by the plaintiff to make a machine for the defendant, the proper remedy would have been by an action for goods sold and delivered, or an action for not accepting the machine. Under those circumstances, Atkinson *v.* Bell would have been an authority. But here it appears that the plaintiff was merely employed to use his skill in devising a mode of carrying out the defendant's invention."

[2] 8 B. C. 277.

[3] 6 M. & G. 963.

[4] Tindal, C. J., in this case, said: "There can be no doubt but that a contract for the making of a chattel, does not of itself vest the property in the chattel, when completed, in the person giving the order. But here, the question turns, not upon the original contract between the plaintiff and the bankrupt, but upon the circumstances which afterwards took place, viz., the payment by the plaintiff, after the greenhouse had been completed, of the stipulated price, the appropriation and setting apart by the bankrupts of the greenhouse for the plaintiff, and his assent to such appropriation. There was an appropriation on the one side, and an assent to such appropriation on the other; which, I think, was quite sufficient to pass the property to the plaintiff. It may be, that the original contract did not pass the property; but the parties may be said to have entered into a new contract. I cannot conceive why, under the circumstances of this case, the property in an article made to order should not pass upon its completion, as it would have done if it had been in existence at the time of the original contract. The objections raised upon this point were mainly founded upon Atkinson *v.* Bell, 8 B. & C. 277. But, if that case be examined, it will be found not to apply. The decision there turned entirely on the absence of assent on the part of the purchasers to the appropriation of the machines by the vendor. Looking at the facts of this case, it seems to me that there is complete evidence of assent

Indebitatus assumpsit was brought in Clark *v.* Bulwer,[1] in the sum of £3000 "for the price and value of a main engine and other goods *sold and delivered*." It was proved at the trial, that the contract was to "build an engine of 100 horse-power for the sum of £2500, to be *completed and fixed* by the middle or end of December; and it appeared that the different parts of the engine were

on the part of the plaintiff to the appropriation made by the vendors. The plaintiff was informed by letter that the greenhouse was finished, and was requested to remit the price. He did so, at the same time requesting the vendors to keep the greenhouse for him until he sent for it. It has been argued, that the letter of the plaintiff, desiring the vendors to keep the greenhouse for him, was written before the article was seen, and that it would be hard if it were held to be such an acceptance as would preclude him from rejecting the article if it afterwards turned out defective in its construction. If a purchaser's assent to the appropriation was shown to have been obtained by misrepresentation, it seems to me it would probably be held to be no assent at all. But that is not the case here; and although the plaintiff thought proper to assent to the appropriation without seeing the greenhouse, the assent was not the less complete. I think, therefore, that the property vested in the plaintiff so as to enable him to maintain this action." It was conceded in this case that the rule laid down in Mucklow *v.* Mangles, 1 Taunt. 318, is the correct one, viz., that while the article remains unfinished, no property in it passes, notwithstanding the vendor may intend it for the purchaser, or may put his name upon it, or otherwise show an intention to appropriate it, and that a payment of money on account makes no difference. In Rohde *v.* Thwaites, 6 B. & C. 388 (the case referred to by Bayley, J., in Atkinson *v.* Bell, 8 B. & C. 277), where the assent was held sufficient to pass the property, the vendee never saw the sugars, which were the subject of the sale; but having received a message from the seller that they were ready for him, he sent word back that he would take them away as soon as he could; and it was held to be such an assent that the property passed. See, further, as to property passing, Goodall *v.* Skelton, 2 H. Bl. 316; Tarling *v.* Baxter, 6 B. & C. 360; Bartram *v.* Payne, 3 C. & P. 175; Carruthers *v.* Payne, 5 Bing. 270; Woods *v.* Russell, 5 B. & Ald. 942; Elmore *v.* Stone, 1 Taunt. 458; Rugg *v.* Minett, 11 East, 210; Howe *v.* Palmer, 3 B. & Ald. 321; Carter *v.* Toussaint, 5 B. & Ald. 855. In Alexander *v.* Gardner, 1 Scott, 630, the plaintiffs sold to the defendants a quantity of Sligo butter, which was to be shipped for London in October. The butters were not shipped until the 6th of November. On the 10th the defendants were informed that the butters were not shipped within the contract time, and though they at first demurred they subsequently verbally consented to waive the objection, and accepted the invoice and the bill of lading, which the plaintiffs indorsed to them. The invoice specified the weights and prices of the several firkins. The vessel on board of which the butters were shipped was wrecked, and part of the butters was lost, and the remainder damaged. In *indebitatus assumpsit* for goods bargained and sold, the jury found that the defendants had waived the performance of the condition as to the shipment of the butters in October. The court held that there was a sufficient appropriation and ascertainment of the goods, and assent thereto by the defendants, to vest the property in them, and consequently that the action was maintainable. Elliott *v.* Pybus, 4 M. & Sc. 389, is also to the effect that a specific appropriation of goods assented to by the buyer is sufficient to support an action for goods bargained and sold. But in Simmons *v.* Swift, 5 B. & C. 857, where the owner of a stack of bark entered into a contract to sell it at a certain price *per ton*, and the purchaser agreed to take and pay for it on a day specified, and a part of it was afterwards weighed and delivered to him, it was held that the property in the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid, and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. And see Slubey *v.* Hayward, 2 H. Bl. 504; Hammond *v.* Anderson, 1 N. R. 69; Hanson *v.* Meyer, 6 East, 614; Rugg *v.* Minett, 11 East, 216; Wallace *v.* Breeds, 13 East, 522; Austen *v.* Craven, 4 Taunt. 644; White *v.* Wilks, 5 Taunt. 176; Busk *v.* Davis, 2 M. & S. 397; Shipley *v.* Davis, 5 Taunt. 617.

[1] 11 M. & W. 243.

constructed at the plaintiff's manufactory, and sent in parts at different intervals to the defendant's colliery, a distance of twenty miles, where they were fixed piecemeal, and so made into an engine. It was held that the price agreed upon was not recoverable as for goods sold and delivered; but that the proper form of count was, either in *indebitatus assumpsit* for work, labor, and materials, or for erecting and constructing an engine.[1]

[1] Parke, B., in delivering judgment, said: "Whenever a simple contract is executed, and terminates in a debt, which it is the duty of the defendant to pay instanter, it is no doubt the subject of an *indebitatus* count; but the executed contract must be described properly; and the main question here is, whether it is proper to describe this as a debt for a main engine or *goods sold and delivered*. We think not; the engine was not contracted for to be delivered, or delivered, as an engine, in its complete state, and afterwards affixed to the freehold. There was no sale of it as an entire chattel, and delivery in that character; and therefore it could not be treated as an engine sold and delivered. Nor could the different parts of it which were used in the construction, and from time to time fixed to the freehold, and therefore became part of it, be deemed goods sold and delivered, for there was no contract for the sale of them as movable goods; the contract was in effect that the plaintiff was to select materials, make them into parts of an engine, carry them to a particular place, and put them together, and fix part to the soil, and so convert them into a fixed engine on the land itself, so as to pump the water out of the mine. The cases of Cotterell *v.* Apsey, 6 Taunt. 322, and Tripp *v.* Armitage, 4 M. & W. 693, are authorities that materials used, or intended to be used, in the construction of a fixed building, cannot be deemed goods sold and delivered; and there is no difference between the erection of this sort of fixture and any other building. The proper form of count is in *indebitatus assumpsit*, for work, labor, and materials, or for erecting and constructing an engine. In the course of the argument cases were suggested, where a contract for goods sold and delivered might be blended with one for labor; and it was asked whether a count for goods sold and delivered might not be maintained; as where a specific chattel was bought, and was to be carried to the house of the purchaser, for an entire sum. There the price of the commodity might be considered as enhanced by the delivery, and the debt properly described, as for the price of goods sold and delivered. If it were part of the contract that the chattel purchased should be afterwards annexed to the freehold by the vendor, and for an entire sum, it might perhaps admit of a question whether that form of action alone would be proper. This it is unnecessary to decide; as also the question, whether the value of this steam-engine might have been recovered in this form of action by the defendants, if they had been tenants of the land, and sold this on quitting as a removable fixture to the landlord or the incoming tenant. The objection in this case is, that there was no contract of sale at all, but one for work and labor on the defendant's land, and materials used in the course of that work." In Coombs *v.* Beaumont, 5 B. & Ad. 72, it was held that a steam-engine for the purpose of working a colliery did not come within the description of "goods and chattels" in the English Bankrupt Act. So, in Nutt *v.* Butler, 5 Esp. 176, it was held that fixtures not separated from the freehold could not be recovered under a count for goods sold. And in Mucklow *v.* Mangles, 1 Taunt. 318, it was held that if a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him. Mansfield, J., said: "The only effect of the payment is, that the bankrupt was under a contract to finish the barge; that is quite a different thing from a contract of sale; and until the barge was finished we cannot say that it was so far Pocock's property, that he could have taken it away." And Heath, J.: "This is the species of contract which in the civil law is described by the term *Do ut facias*. It comes within the cases which have been held to be executory contracts, and as such not within the statute of frauds as contracts for the sale of goods. A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain. He could not bring

The plaintiff, in Clay *v.* Yates,[1] a printer, verbally agreed to print for the defendant 500 copies of a treatise, to which a dedication was to be prefixed, at a certain price per sheet, including paper. The treatise was printed, and after the proof-sheet of the dedication was revised by the defendant and returned to the plaintiff, he, for the first time, discovered that it contained libellous matter, and refused to complete the printing of it. The defendant would not pay for the treatise without the dedication, whereupon the action was brought to recover for printing the treatise. It was objected, on behalf of the defendant: *First*, that this was a contract for the sale of goods within the seventeenth section of the Statute of Frauds, as extended by Lord Tenterden's Act. *Secondly*, that the contract was an entire one, viz., to print the treatise and the dedication, and that the plaintiff, having refused to print the dedication, was not entitled to recover in respect of the treatise. The jury found that the essence of the contract was work and labor, and the materials merely ancillary, and that the dedication was libellous. A verdict was accordingly entered for the plaintiff (the declaration containing counts both for goods sold and delivered and work and labor and materials), leave being reserved to enter a verdict for the defendant. The Court of Exchequer sustained the verdict for the plaintiff, holding that the contract was not for the sale of goods within the seventeenth section of the Statute of Frauds, but was, properly, a contract for work and labor and materials. While this case is considered as being opposed to Atkinson *v.* Bell,[2] we think that the cases are quite consistent with each other.

In this case there was, clearly, no contract for goods sold and delivered, and the language of Bayley, J., in Atkinson *v.* Bell, had no reference to a case such as this, where the work and labor was the essence of the contract, and the materials were merely ancillary. In Atkinson *v.* Bell, the main point is that the action should have been for not accepting the goods, and that the defendant, not having assented to the particular goods that were made, was not liable in an action for the specific goods, as for goods bargained and sold; which action, and not that for work and labor and materials, would have been the proper form of action had the goods been accepted. If, in that case, the materials had been provided by the defendant; or if, as in Clay *v.* Yates,[3] the plaintiff had done the work and labor as the essence of

trover against the purchaser for the goods so sold. The painting of the name on the stern in this case makes no difference. If the thing be in existence at the time of the order, the property of it passes by the contract, but not so where the subject is to be made."

[1] 1 H. & N. 73.
[2] 8 B. & C. 277.
[3] 1 H. & N. 73.

the contract on materials which were merely ancillary, then the language of Bayley, J., in Atkinson *v.* Bell,[1] dealing with an entirely different matter, would have been of a different character from what it was. In that case, he did refer to one of the cases where a count for work and labor would lie, viz., where the work was done on the defendant's materials, in which case the question as to the passage of the property in the goods would not arise. But, as it was not necessary for him in that case to do, he did not refer to such a case as that of Clay *v.* Yates,[2] where, *even had there been an acceptance of the books*, a count for goods sold and delivered would not even then lie, from the simple fact, that, in this latter case, the very essence of the contract was, not that of a sale at all, but a specific contract for work and labor; the plaintiff agreeing to print for the defendant, from the defendant's "copy," 500 copies of a treatise, *at a certain price per sheet*, including paper. So, there is this radical difference between the two cases, with reference to which the language in them has to be considered, that, had there been an acceptance of the goods in both cases, in one of them, clearly, a count for goods bargained and sold would not lie; while, in the other, the court held, and we think properly so, and in accordance with the principle of many other well-decided cases, that that would have been the correct form of action. The cases would have been much more nearly alike had the contract in Atkinson *v.* Bell contained any ingredient, such, for instance, as a specified rate of wages, or anything of that nature, from which a contract for work and labor might be deduced. But, as it is, it is nothing more or less than the ordinary case of an order for goods to be manufactured, for which, on completion and acceptance, the ordinary form of action is for goods bargained and sold, or goods sold and delivered. In Clay *v.* Yates[3] there is, also, not only the fact that the contract was for a fixed price, proportioned to the amount of work and labor to be done; and that, in respect to that work and labor, the paper furnished was merely ancillary; but that, it was also ancillary in another respect, as the essential material for the work was furnished by the defendant himself in the "copy" from which the sheets were to be printed, and that the result was a subject-matter in which the printer had at most but a special property, and not such a general property therein as though the result were an article of his own manufacture. The general property in the book was in the author and owner, for whom the work of printing was done, and who, in a suitable case, could restrain the

[1] 8 B. & C. 277.
[2] 1 H. & N. 73.
[3] *Ibid.*

printer by injunction from making an improper disposition of the book.[1]

[1] Considering the differences which we have pointed out between Atkinson *v.* Bell, 8 B. & C. 277, and Clay *v.* Yates, 1 H. & N. 73, the following, from the latter case, is in point. Pollock, C. B., says: "It may happen that part of the materials is found by the person for whom the work is done, and part by the person who does the work, for instance, the paper for printing may be found by the one party, while the ink is found by the printer. In such cases it seems to me that the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied. My impression is, that in the case of a work of art, whether in gold, silver, marble, or plaster, where the application of skill and labor is of the highest description, and the material is of no importance as compared with the labor, the price may be recovered as work, labor, and materials. No doubt it is a chattel that was bargained for, and if delivered might be recovered as goods sold and delivered; still it may also be recovered as work, labor, and materials. Therefore it appears to me that this is properly a contract for work, labor, and materials." We think this is rather a *non sequitur*, and that, without taking any such extreme ground as this, the judgment of the court, holding that the contract was not within the 17th section of the statute of frauds as a sale of goods, but was good as a contract to perform work and labor, on the grounds we have stated, is sustainable. It is thus put by Martin, B., who says: "There are three matters of charge well known to the law, viz., for labor simply, for labor and materials, and for goods sold and delivered. Now every case must be judged of by itself; and what is the present case? The defendant, having a manuscript, takes it to a printer to print for him. Then what does he intend shall be done? He intends that the printer shall use his type; shall set it up in a frame and impress it on paper; that the paper shall be submitted to the author; that the author, having corrected it, shall send it back to the printer, who shall again exercise labor and make it into a complete thing in the shape of a book. That being so, I think that the plaintiff was employed to do work and labor, and supply materials, and for that he is entitled to be paid. It seems to me that the true criterion is this. Suppose there was no contract as to payment, and the printer brought an action to recover what he was by law entitled to receive, would that be the value of the book as a book? I apprehend not; for the book might not be worth half the value of the paper on which it was printed, but he would be entitled to recover for his work, labor, and materials supplied; therefore, this is in strictness work, labor, and materials done and provided by the plaintiff for the defendant." While we think Clay *v.* Yates, 1 H. & N. 73, was well decided on the facts, we think that the efforts both of Pollock, C. B., and Martin, B., to deduce from that case a principle to suit all cases is not successful. On the argument in that case, Martin, B., said: "Suppose an artist paints a portrait for 300 guineas, and supplies the canvas for it, which is worth 10*s.*, surely he might recover under a count for work and labor." But in Grafton *v.* Armitage, 2 C. B. 336, Coltman, J., says: "The claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work and labor bestowed by him in the fabrication of them." Where the artist paints *a portrait* there might be a ground for distinguishing such a case (where the portrait has been specially ordered and would not be generally marketable) from the case where he was to paint a picture which would be, after its completion, a fair, marketable subject of sale. But, even in the case of a portrait, it would not, in that respect, differ materially from the case of a tailor making a suit of clothes to measure, which, from some peculiarity in the person for whom they were made, would be unsalable. Nor does the value of the materials used, relatively with that of the ultimate product, furnish a reliable test. In the case of the tailor, he may make two suits, one of a very cheap and the other of a very expensive material, the cost of the making being the same in both cases, and yet it would seem absurd that he could recover for goods sold and delivered in the one case and not in the other. So that the manufacturer of anchors, where the value of the raw material approximates closely to that of the manufactured article, would be confined to an action for goods sold; while the manufacturer of watch-springs, where the value of the raw material is a mere fraction of the value of the finished article, could bring an action for work and labor. This, clearly, is not the criterion. On the whole, our deductions would be that, where the labor is performed on the materials of the party ordering the work, so that the subject continues vested in him throughout the whole of the work; there, as there would be no subject of sale, the claim would be clearly for work and labor. But, in any other case, outside of express contracts for work and labor, or where such a contract could

We think that the conclusion we have reached in our next preceding note to Clay *v.* Yates [1] is fully sustained by the holding of the court in the subsequent case of Lee *v.* Griffin,[2] which we have only examined in this connection after having written the preceding note.

In Lee *v.* Griffin the case came up expressly under the Statute of Frauds. The action was brought to recover £21 for two sets of teeth ordered by the defendant's intestate. The declaration contained counts for goods bargained and sold, goods sold and delivered, and for work and labor and materials. Under the plea of never indebted, the defendant's counsel claimed a nonsuit, under the decision in Clay *v.* Yates,[3] on the ground that the contract was within the seventeenth section of the statute. The judge refused to nonsuit, and directed a verdict for the plaintiff, with leave reserved to the defendant to move for a nonsuit or verdict. The court held, unanimously, that the contract was for the sale of goods, wares, or merchandise within the seventeenth section. On the argument, the plaintiff's counsel relied on the *dicta* of Pollock, C. B., and Martin, B., in Clay *v.* Yates,[4] thus: "Suppose an artist paints a portrait for 300 guineas, and supplies the canvas for it worth 10*s.*, surely he might recover under a count for work and labor;" and "In the case of a work of art, whether in gold, silver, marble, or plaster, where the application of skill and

be fairly implied from the circumstances of the case (such cases, for instance, as Grafton *v.* Armitage, 2 C. B. 336, and Clay *v.* Yates, 1 H. & N. 73, in effect were), where the subject when completed is the subject of a sale, and remains vested in the maker so that he could pass the property in it to a third party; there, whether the subject-matter be a portrait or any other work of an artist, or a suit of clothes or any other manufactured article, the contract for such an article, we think, comes within the 17th section of the statute, as a contract for the sale of goods, wares, or merchandise. This discriminates that class of cases where a count for work and labor and materials has been sustained for work done by farriers, medical men, and surveyors, and such a case, as is sometimes put, of a conveyancer preparing a deed; because, in these cases, there is really no subject-matter of sale. In Clay *v.* Yates, 1 H. & N., at p. 80, Martin, B., refers to the fact that in Bensley *v.* Bignold, 5 B. & Ald. 335, 340, Bayley, J. (whose reasoning in Atkinson *v.* Bell, 8 B. & C. 277, has been so greatly criticised), with Abbott, C. J., where the defence was that the printer had not affixed his name to the book, as required by the 39 Geo. 3, c. 79, s. 27, treated it, as held in Clay *v.* Yates, as a contract for work and labor and materials. And we think, quite in harmony with this, notwithstanding the *dicta* of Bayley, J., in Atkinson *v.* Bell, 8 B. & C. 277, that that learned judge would fully assent to the decision of the courts in Grafton *v.* Armitage, 2 C. B. 336, and Clay *v.* Yates, 1 H. & N. 73; and that these cases are not inconsistent with the actual holding in Atkinson *v.* Bell, notwithstanding the utterly irreconcilable *dicta* which are to be found in these three cases.

In the 2d edition of Blackburn on Sales, p. 15, the editor treats this question as being now of comparatively little importance in England, owing to the change there in their system of pleading. But though, under the common-law system, any but the most careless or ignorant of pleaders would, in such cases, insert both counts; entirely independent of pleading the question is important, as if the contract is for work and labor only, it does not come within the 17th section of the statute of frauds, as it does if it is a contract for the sale of goods, wares, or merchandise; which is often a matter of very great consequence.

[1] 1 H. & N. 73.
[2] 1 B. & S. 272.
[3] 1 H. & N. 73.
[4] *Ibid.* at p. 76.

labor is of the highest description, and the material is of no importance as compared with the labor, the price ma be recovered as work, labor, and materials." But Blackburn, J., answered him: "Atkinson *v.* Bell[1] is an express authority against you; though the *dictum* of Bayley, J.,[2] that a plaintiff cannot maintain an action for work and labor, where the labor was bestowed on his own materials, is not law, and has been dissented from in Grafton *v.* Armitage[3] and also in Clay *v.* Yates."[4]

The same able judge, in his judgment, states the law with his usual accuracy and clearness. Blackburn, J., says: "The question is whether the contract was one for the sale of goods or for work and labor. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category."

In Atkinson *v.* Bell,[5] the contract, if carried out, would have resulted in the sale of a chattel. In Grafton *v.* Armitage,[6] Tindal, C. J., lays down this very principle. He draws a distinction between the case of Atkinson *v.* Bell and that before him. The reason he gives is, "That, in the former case, 'the substance of the contract was goods to be sold and delivered by the one party to the other:' in the latter, 'there never was any intention to make anything that could properly become the subject of an action for goods sold and delivered.' I think that distinction reconciles those two cases, and the decision of Clay *v.* Yates[7] is not inconsistent with them. In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed

[1] 8 B. & C. 277.
[2] Pp. 283, 284.
[3] 2 C. B. 336.
[4] 1 H. & N. 73.
[5] 8 B. & C. 277.
[6] 2 C. B. 340.
[7] 1 H. & N. 73.

to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel." And Crompton, J.: "The main question which arose at the trial was, whether the contract could be treated as one for work and labor, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might, perhaps, be brought for work and labor done, and materials provided, as it could hardly be said that the subject-matter of the contract was the sale of a chattel; perhaps it is more in the nature of a contract merely to exercise skill and labor. Clay *v.* Yates [1] turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labor, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labor or for the sale of a chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment." We see no good ground for the doubt expressed by Crompton, J., as to the soundness of Clay *v.* Yates.[2] While we think that Lee *v.* Griffin [3] is undoubtedly well decided, yet we are quite of the opinion of Blackburn and Hill, JJ., in that case, that the decision in Clay *v.* Yates is perfectly sound. Hill, J., said: "I think that the decision in Clay *v.* Yates [4] is perfectly right. That was not a case in which a party ordered a chattel of another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labor. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labor. Atkinson *v.* Bell [5] is, in my opinion, good law, with the exception of the *dictum* of Bayley, J., which is repudiated by Maule, J., in Grafton *v.* Armitage,[6] where he says: 'In order to sustain a count for work and labor, it is not necessary that the

[1] 1 H. & N. 73.
[2] *Ibid.*
[3] 1 B. & S. 272.
[4] 1 H. & N. 73.
[5] 8 B. & C. 277.
[6] 2 C. B. 339.

work and labor should be performed upon materials that are the property of the plaintiff.' And Tindal, C. J., in his judgment in the same case, points out that in the application of the observations of Bayley, J., regard must be had to the particular facts of the case. In every other respect, therefore, the case of Atkinson *v.* Bell is law. I think that these authorities are a complete answer to the point taken at the trial on behalf of the plaintiff." Lee *v.* Griffin is the latest decided English case down to the present time, and we think it thoroughly well settles the law on what was previously a not at all well-settled question.

The deduction we have made in our note [1] to Clay *v.* Yates [2] is fully sustained, in principle, by the holding in Lee *v.* Griffin.[3] We here repeat it: Where the labor is performed on the materials of the party ordering the work, so that the subject continues vested in him throughout the whole of the work; there, as there would be a subject of sale, the claim would be clearly for work and labor. But, in any other case, outside of express contracts for work and labor, or where such a contract would be fairly implied from the circumstances of the case (such cases, for instance, as Grafton *v.* Armitage [4] and Clay *v.* Yates,[5] in effect, were), where the subject when completed is the subject of a sale, and remains vested in the maker so that he could pass the property in it to a third party; there, whether the subject-matter be a portrait or any other work of an artist, or a suit of clothes or any other manufactured article, the contract for such an article, we think, comes within the seventeenth section of the statute, as a contract for the sale of goods, wares, or merchandise. This discriminates that class of cases where a contract for work and labor and materials has been sustained for work done by farriers, medical men, and surveyors, and such a case, as is sometimes met, of a conveyancer preparing a deed, because in these cases there is really no subject-matter of sale.

We think that Lee *v.* Griffin,[6] in deciding that a contract to make a set of artificial teeth is a contract for the sale of goods, wares, or merchandise within the seventeenth section of the statute, while, on principle, thoroughly well decided, deals with one of the most extreme cases that can be imagined, and settles the whole question. The supposed exceptional cases of work and labor by a painter, a sculptor, a shoemaker, or a tailor, all clearly come within the principle conclusively established in England by the unquestioned case of Lee *v.* Griffin,[7] and no longer have about them an element of doubt.

[1] *Supra*, p. 260.
[2] 1 H. & N. 73.
[3] 1 B. & S. 272.
[4] 2 C. B. 336.
[5] 1 H. & N. 73.
[6] 1 B. & S. 272.
[7] *Ibid.*

BOOK IV.

PART IV.

EXCHANGE OR BARTER.

As we have seen[1] that there is no essential difference between a sale and a barter or exchange, at common law, but that the legal effect in both class of cases is essentially the same; so, under the Statute of Frauds, as regards both the fourth and seventeenth sections, an exchange or barter comes within the term "sale," used in those sections.

The objection was taken in Pembroke *v.* Thorpe[2] that a parol contract for the exchange of lands comes within the fourth section of the statute, and it was so held by Lord Hardwicke, who also there held that in equity the part performance of the contract would take the case out of the statute in the same way that it does in the case of a sale. It has likewise been held in the Supreme Court of the United States that parol proof of the intention to exchange lands cannot be permitted.[3] And in New Hampshire, it has so been held, where the consideration for the sale of land by parol was money, labor to be performed, and chattels to be delivered.[4] The court here dealt with the question as to how far there was a remedy at law where there had been a part performance of the contract, thus: "A parol contract for the sale of lands is not declared by the statute to be void. It is only declared that no action shall be maintained upon it.[5] And we are of opinion that the plaintiff is not at liberty to treat the contract for the sale of the land in this case as void, unless the defendant has refused or disabled himself to perform it. If one man contracts with another to perform labor, and receive as a compensation the conveyance of a particular tract of land, although the contract to convey the land is not a proper foundation for an action, yet still common honesty and fair dealing require that he shall not be at liberty to refuse the land, and demand money, until the other

[1] *Ante*, Vol. I., Book I., Part I.
[2] Stated in note to Gordon *v.* Cordon, 3 Swanst. 437, 441.
[3] Clark *v.* Graham, 6 Wheat. 577.
[4] Lane *v.* Shackford, 5 N. H. 130, 133.
[5] Davenport *v.* Mason, 15 Mass. 85; Crosby *v.* Wadsworth, 6 East, 611.

party has refused to execute the contract. But we have no doubt that in general, when a contract within the Statute of Frauds has been in part executed by one party, there is a plain remedy for such party, to a certain extent, in a court of law, if the other party fraudulently refuse to execute the contract on his part. If money has been paid, it may be recovered back. If labor has been performed, a compensation for it may be recovered. These principles are recognized in the following cases." [1]

At common law an exchange, without livery of seisin, prior to the enactment of 29 Car. 2, c. 3, transferred real estate when the lands lay in the same county, and such exchange, by parol, was good, provided each party went into possession of the lands acquired by such exchange; but if the lands were situate in different counties, or either party died before going into possession, such parol exchange was void.[2]

But in Ohio, it was held that this principle of the common law had never been adopted there, and that a parol exchange of lands there is invalid to pass any legal title therein.[3] And in A. D. 1813 the same doctrine was held in Maryland.[4] In Moss *v.* Culver [5] it is said: "It is true, as has been often said, there is no difference between a parol sale and an exchange in regard to the requisites to take it out of the Statute of Frauds and Perjuries. A clear, explicit, and unambiguous contract, and a taking of possession under and in pursuance of the contract, are as much requisites of a parol exchange as of a sale. But there is a marked difference in the evidence which establishes the possession. A sale is confined to a subject coming from a single side. It has no relation to, or dependence on any other subject. The evidence of possession taken of it is therefore confined to the single subject, and if not taken in a seasonable time, or so as to make it doubtful whether it is attributable to the contract, the parol sale is not taken out of the statute. But an exchange necessarily has a subject on each side which stands related to the other. One is the representative of the other, so much so that the law implies a contract of warranty by the act of exchanging. If therefore the evidence shows a clear, unequivocal, and complete taking possession of one of the subjects of an exchange, by the party owning the

[1] Kidder *v.* Hunt, 1 Pick. 328; Sherburne *v.* Fuller, 5 Mass. 133; Boyd *v.* Stone, 11 Mass. 342; Mavor *v.* Pyne, 2 C. & P. 91; Burlingame *v.* Burlingame, 5 Johns. 85; Ketcham *v.* Evartson, 13 Johns. 365.

[2] Littleton, §§ 62–[illegible]; Co. Litt. §§ 50, 51; Shep. Touch. 294.

[3] Lessee of Lindsley *v.* Coates, 1 Ohio, 243 (A. D. 1823).

[4] Carroll's Lessee *v.* Maydwell, 2 Har. & J. 292; Maydwell *v.* Carroll, 3 Har. & J. 361. But see in Pennsylvania, Wood *v.* Farmare, 10 Watts, 195; M[illegible] *v.* Miles, 8 W. & S. 135; Moore *v.* Small, 19 Pa. St. 461; Reynolds *v.* Hewett, 27 Pa. St. 176; Moss *v.* Culver, 64 Pa. St. 414, under the effect of the equitable doctrine of part performance.

[5] 64 Pa. St. 414.

other subject, it strengthens the evidence of a possession taken by the opposite party of the corresponding subject. Evidence of possession that might seem weak and inconclusive in the case of a parol sale is thus made clear and convincing in the case of an exchange." This, however, would amount to no more than if, in the case of a sale, the possession were taken by the one party and the money consideration were received by the other.

In Anon.,[1] it was held that in exchanges of land the word "exchange" is necessary in the conveyance, because it imports a special warranty in respect of the mutual consideration of the lands exchanged. It is there said, "*Permutatio vicina est emptioni*, but exchanges were the original and natural way of commerce, precedent to buying, for there was no buying till money was invented. Now, in exchanging, both parties are buyers and sellers, and both equally warrant; and this is a natural rather than a civil contract; so by the civil law, upon a bare agreement to exchange, without a delivery on both sides, neither of the parties could have an action upon such an agreement, as they may in cases of selling; but if there was a delivery on one side, and not on the other, in such case the deliverer must have an action to recover the thing which he delivered, but he could have no action to enforce the other to deliver what he agreed to deliver, and which the deliverer was to have in lieu of that thing which he delivered to the other."

In Dowling *v.* McKenney[2] the defendant orally agreed to convey to the plaintiff a lot of land valued at $400, and to take, in exchange or payment therefor, a monument, estimated to be of the value of $200, when completed, and the balance in money. After the monument was finished, the plaintiff tendered it to the defendant, together with the balance in money, according to the contract. The defendant refused to accept the monument or money, or to give the deed. The court, in holding that this was a contract within the Statute of Frauds, said, "Whether this was a sale or an exchange of property is immaterial. Assuming that it was an exchange of the land for the monument, with a balance in money to be paid by the plaintiff, it is to be governed by the same rules as apply to a sale when the whole consideration is to be paid in money. The contract was therefore within the prohibition of the Statute of Frauds. The oral promise on the part of the defendant was not to pay money for the monument, but to convey a lot of land. If the promise had been to pay in money for the monument, when completed, it might have come within the rule that an agreement to construct or build an article to be

[1] 3 Salk. 157. [2] 124 Mass. 478.

paid for when finished need not be proved by a memorandum in writing, as in Mixer *v.* Howarth.[1] But that view of the case cannot be sustained on the evidence as reported; it does not appear to have been the intention of the parties to make any contract, except that which included the conveyance of the land, which was the sole consideration moving from the defendant. That contract was not in writing, and cannot be enforced, in whole or in part. The plaintiff cannot separate that portion which relates to the building of the monument from the whole, and recover upon it as a distinct undertaking. This would be to make a new contract between the parties; for it was no part of the agreement, as stated, to pay $200 in money for the monument, but to allow that sum as a portion of the consideration for the conveyance of the land. The plaintiff therefore cannot recover for the value of the monument."

In Kuhn *v.* Gates[2] it was held, in the case of an exchange of a colt and $40 in money for a mare, that the delivery of the colt was sufficient to bind the bargain; the delivery of any article of value as an earnest to bind a bargain being a sufficient compliance with the provisions of the Statute of Frauds respecting the sale of personal property of the value of $50 or upwards. Not only under the Statute of Frauds, but under analogous statutes, an exchange or payment in goods is held to be equivalent to a sale or to a payment in money. We examine some of the authorities.

In Girard *v.* Patterson[3] the Supreme Court of Indiana held that the plea of payment of a debt in goods, wares, and merchandise was bad, because, as a plea of accord and satisfaction, it was insufficient, as that plea required that it should be averred that the goods were delivered in payment of the demand, and also that they were accepted in satisfaction thereof. For this Drake *v.* Mitchell[4] was cited. But this case was one where a bill of exchange for *part* only of the debt was given, and the declaration did not, as in the Indiana case, contain an averment of the payment of the full amount of the debt and interest. But, in the same case in Indiana, it was held that as a plea of payment it was also bad, on the ground that a plea of payment cannot be supported unless the payment has been made in money alone.

But this case is not law, and has been expressly repudiated in later cases in Indiana. In Louden *v.* Birt[5] it is laid down that payment may be made in anything that the creditor will accept as payment. And under the general issue, or as a general plea

[1] 21 Pick. 105.
[2] 22 Ind. 66.
[3] 3 Blackf. 353.
[4] 3 East, 251.
[5] 4 Ind. 566, 570.

of payment, payment in anything that has been accepted, or received as payment, may be proved. And in these cases it is a question for the jury whether what may have been given or received was a payment or not, in the particular case. This case follows Moore *v.* Stadden [1] and Willard *v.* Gormer.[2] In the former of these, in an action on a promissory note, by an indorsee after the note had matured, the defence was that the defendant performed work and labor for the payee, while he held the note, which, by agreement, was to be applied to the payment of it. The defence was held good. In the latter of these cases it was held, in an action on a promissory note, that a creditor may receive in satisfaction and discharge of his demand, *an account against a stranger,* as well as a negotiable note, or other thing in action. The question always is, whether he intended to receive it in absolute payment, and to discharge the debtor; and this is a question to be submitted to the jury. Louden *v.* Birt [3] was recognized in the later case of Tilford *v.* Roberts,[4] where it was held that payment may be made in anything which the creditor will accept as payment.

In the very late Indiana case of Weir *v.* Hudnut [5] (A. D. 1888) a similar question came up under the Statute of Frauds, and was decided in accordance with the holding in Kuhn *v.* Gates,[6] which we have stated *ante*, p. 268. In Weir *v.* Hudnut, which was an action for the non-acceptance by the defendant of 5000 bushels of corn sold him by the plaintiff, it was alleged that as a part of the consideration for the corn, the defendant delivered the plaintiff 1500 sacks, to be used for sacking the corn; that the use of such sacks for that purpose was of the value of $25, and that the use of such sacks was received in part payment for the corn. On demurrer to this complaint, the court held, reversing the judgment of the Circuit Court, that payment in articles of property will bind the bargain and prevent the operation of the Statute of Frauds. The Supreme Court say, "What the parties agree shall constitute payment, the law will adjudge to be payment. It is competent for parties to designate by their contract how and in what payment may be made. It is by no means true that payment can only be made in money. On the contrary, it may be made in property or in services. In short, whatever the parties agree shall constitute payment will be regarded by the courts as payment, provided the thing agreed upon is of some value. . . . The complaint brings the case within the principles declared by

[1] Wright (Ohio), 88.
[2] 1 Sandf. 50.
[3] 4 Ind. 566.
[4] 8 Ind. 254.
[5] 115 Ind. 525.
[6] 92 Ind. 66.

the authorities, for it shows that the value of the use of the sacks was $25, and that the purchase-price to that extent was paid by the seller's furnishing the sacks for the use of the buyer. If the seller had agreed to furnish for the use of the buyer a corn-sheller, or some other machine, as part payment of the purchase-price, it would be very clear that such a payment would bind the bargain, and there is no difference in principle between such a case and one like the present, for it can make no difference what thing of value is given in part payment. Of course, the thing must be given in part payment of the purchase-money agreed upon, or it will be unavailing; but here, as we have said, the property furnished the buyer is conceded to have been in part payment of the agreed price of the corn."

So, in Hunter *v.* Wetsell,[1] where it was claimed that as a check was not money, the receipt of a check on a parol contract for goods over the value of $50, was not a payment of any part of the purchase-money, inasmuch as it was not in itself payment, and having been drawn upon a bank, could not have been in fact paid until afterward; and so there was no payment "at the time," to satisfy the requirements of the New York statute to that effect.[2] But the court held that while it is true that a check, in and of itself, is not payment, it may become so when accepted as such, and is in due course actually paid. While not money, it is a thing of value, and is money's worth, when drawn against an existing deposit which remains until the check is presented. And that, in that case, the check having been subsequently paid, its receipt, at the time of the making of the contract, was a sufficient payment to take the case out of the New York Statute of Frauds.

In Combs *v.* Bateman[3] a verbal agreement to exchange horses of a greater value than $50, for oxen and $20, was expressly held to be within the statute, and not taken out by the delivery of the party's own note for the $20. In Sharp *v.* Carroll[4] a verbal agreement for the purchase of wheat was held to be taken out of the statute by the delivery by the vendee to the vendor of the latter's promissory note for $500 in part payment. In so deciding, the court said: "It was argued by counsel for defendant that, the sale being by parol, and not accompanied by an immediate actual delivery of the property, the surrender of the note of the vendor was not such a part payment as will take the case out of the Statute of Frauds and render it valid. The authorities cited for

[1] 84 N. Y. 549.

[2] See Hunter *v.* Wetsell, 57 N. Y. 375; Allen *v.* Aguina, 5 N. Y. S. C. 380; Sprague *v.* Blake, 20 Wend. 61; Brabin *v.* Hyde, 32 N. Y. 519; 45 N. Y. 148, 149.

[3] 10 Barb. 573.

[4] 66 Wis. 62.

that proposition do not sustain it. They only hold that an agreement to surrender a claim or give a credit, in payment or part payment for the thing purchased, is not sufficient. The surrender must actually be made or the credit given. The purchaser must, at the time of the purchase, part with something of value. In this case the plaintiff did part with something of value in part payment for the wheat, to wit, the note he held against the vendor. Such note was eventually cancelled by the delivery thereof to the maker pursuant to the parol contract."[1]

On the same principle on which these cases have been decided under the Statute of Frauds, it has been held in Massachusetts that liquor exchanged for services, where such liquor has been given and intended as payment for such service, and is so received, constitutes a sale within the meaning of the Intoxicating Liquor Acts.[2] And in two very able judgments[3] by Chief Justice Bigelow,[4] an exchange is treated under those acts as synonymous with a sale.

In Walker *v.* Nussey,[5] the plaintiff sued for the price of a quantity of leather as for goods sold and delivered by him to the defendant, above £10 in value. The defendant had previously sold the plaintiff goods for £4 14*s.* 11*d.* On the new dealing between them the agreement was, that that sum should be taken as part payment by the defendant, and that he should only pay the plaintiff the difference between that sum and the price of the goods bought from him. This contract was verbal; but it was argued, that the £4 14*s.* 11*d.* was a part payment by the defendant, so as to take the case out of the Statute of Frauds. But the court held that it was not.[6]

[1] See also as to an exchange of cotton being within the statute, Phillips *v.* Ocmulgee Mills, 55 Ga. 633. So, in Rutan *v.* Hinchman, 30 N. J. L. 255, a verbal agreement to sell and exchange a horse of the value of $200 for a lot of land and $100 in cash, was held to be within the statute.

[2] Mason *v.* Lothrop, 7 Gray, 354, 358.

[3] See *supra*, Vol. I. p. 10, n. 2.

[4] Commonwealth *v.* Clark, 14 Gray, 367, and Howard *v.* Harris, 8 Allen, 297.

[5] 16 M. & W. 302.

[6] Parke, B., in his judgment, said: "If the contract had been shown to have been that the parties were to be put in the same situation at that time, as if the plaintiff's debt to the defendant had then been paid, or as if it had been paid to the defendant and repaid by him to the plaintiff as earnest, the statute might have been satisfied, without any money having passed in fact; but the agreement was, in fact, that the goods should be delivered by the plaintiff by way of satisfaction of the debt previously due from him to the defendant, and that the defendant should pay for the rest. Then the buyer did not 'give something in earnest to bind the bargain, or in part of payment.' The 'part payment' mentioned in the statute must take place either at or subsequent to the time when the bargain was made. Had there been a bargain to sell the leather at a certain price, and subsequently an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff, either might have been an equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest, or

In Bach *v.* Owen[1] a verbal agreement for the exchange of horses was held to be within the Statute of Frauds, and that the payment by one to the other of earnest-money took the case out of the statute.

In Kearslake *v.* Morgan[2] it was held that the plea of the payment, as an accord and satisfaction, of the promissory note of a third party, was a good plea. So, in England, under the Bankruptcy Act,[3] which provides "that no debtor of the bankrupt shall be endangered for the *payment* of his debt truly and *bonâ fide* to any such bankrupt before such time as he shall understand or know that he is become a bankrupt," it was held that the giving for such a debt, by the debtor to the bankrupt, of a bill of exchange, was a payment under this act.[4]

So, again, under the 82nd section of 6 Geo. 4, c. 16, it was held that a delivery of goods, *bonâ fide* made in part payment of a previous debt, after a secret act of bankruptcy committed by the debtor, is a *payment* protected by that act. The court held that as the section did not expressly provide that the payment should be made in money, it might be made in money or money's worth. But, in Carter *v.* Breton,[5] where the goods were delivered not in payment, but as a sale, the court held that it was but a set-off, and not protected by the act as a payment.

And so, under the Statute of Limitations, since the passage of Lord Tenterden's Act,[6] though goods sold, or services rendered may not take the case out of the statute, as there must be a part payment in cash, or what is equivalent to it, to have that effect,[7] yet, where there is an agreement to receive such services, or take goods, in part payment, and they are received and taken on that agreement, it is part payment.

Hence it was held, in Hart *v.* Nash,[8] that if the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is part payment, so as to prevent the operation of the Statute of Limitations. In

in part of payment, then or subsequently. . . . No evidence was given of the actual payment or discharge of the debt due from the plaintiff, so that all rested in the agreement merely." And Pollock, C. B.: "Had these parties positively agreed to extinguish the debt of £4 odd, and receive the goods *pro tanto* instead of it, the law might have been satisfied, without the ceremony of paying it to the defendant, and repaying it by him. But the actual contract did not amount to that, and there has been no part payment within the statute."

[1] 5 T. R. 409.

[2] 5 T. R. 513.

[3] 1 Jac. 1, c. 15, s. 14.

[4] In so deciding, Lord Kenyon, in delivering the judgment of the court, said: "Now, if the defendant had given other goods in exchange for these at the time, that would have been a payment to all intents and purposes, though not made in moneys numbered. And it has always been holden that giving a bill of exchange is deemed a payment in satisfaction, provided the bill be paid when due." Wilkins *v.* Casey, 7 T. R. 711.

[5] 6 Bing. 617.

[6] 9 Geo. 4, c. 14, s. 1.

[7] Williams *v.* Griffiths, 2 C. M. & R. 45.

[8] 2 C. M. & R. 337.

Turner *v.* Dodwell,[1] where it was held that where a bill of exchange has once been so delivered in payment on account of a debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered, as from the time of such delivery, whatever afterwards becomes of the bill; the word "payment" in the proviso in 9 Geo. 4, c. 14, § 1, being used in the popular sense, so as to include a giving and taking of it in satisfaction of the debt; the court said: "We do not see why the immediate operation of the delivery of a bill, as an acknowledgment of the balance of the demand being due, is at all affected by its operation as a payment being liable to be defeated at a future time. The statute intending to make a distinction between mere acknowledgments by word of mouth and acknowledgments proved by the act of payment, it surely cannot be material whether such payment may afterwards be avoided by the thing paid turning out to be worthless. The intention, and the act by which it is evinced, remain the same. We think that the word 'payment' must be taken to be used by the legislature in a popular sense, and in a sense large enough to include the species of payment in question: and we should think that the acknowledgment of liability as to the remainder of the debt is not at all altered by the fact of the notes by which it was paid turning out to be counterfeit. In all these cases the force of the acknowledgment is the same; and the payment is, we think, a sufficient payment within the words of 9 Geo. 4, c. 4."

In Maillaid *v.* The Duke of Argyle,[2] the Court of Common Pleas held that the word "payment" as applicable to a transaction of this kind, even where used in a plea, did not mean payment in satisfaction, but might be treated as used in its popular sense.[3] And in Hooper *v.* Stevens[4] it was held, that where it has been agreed between debtor and creditor that the latter shall receive goods in reduction of his demand, the delivery of such goods operates as a payment within the first section of Lord Tenterden's Act, to bar the Statute of Limitations. It was claimed in this case that the delivery of the goods could not operate as a *payment*, inasmuch as the defendants, if suing for the price, could only declare as for goods and not for a liquidated sum of money. But the

[1] 3 E. & B. 136.
[2] 6 M. & G. 40.
[3] Mr. Justice Maule, in that case, says: "Payment is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises. When you speak of paying in cash, that means in satisfaction, but when by bill, that does not import satisfaction, unless the bill is ultimately taken up." And see Tanner *v.* Smart, 6 B. & C. 603; Irving *v.* Veitch, 3 M. & W. 90; Gowan *v.* Foster, 3 B. & Ad. 507; Griffiths *v.* Owen, 13 M. & W. 58; Belshaw *v.* Bush, 11 C. B. 191; Bishop *v.* Crawshay, 3 B. & C. 415; Foster *v.* Dawber, 6 Ex. 839; James *v.* Williams, 13 M. & W. 828, 833; Turney *v.* Dodwell, 3 E. & B. 136.
[4] 4 A. & E. 71.

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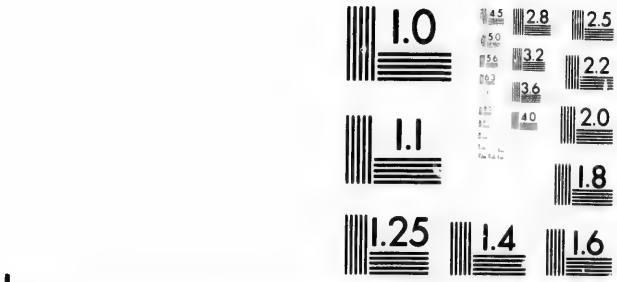

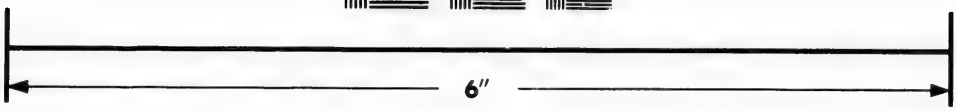

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court held that where anything is received, upon agreement, in reduction of a debt, that is a payment sufficient to take the case out of the Statute of Limitations.

In Maber *v.* Maber[1] it was held, that to constitute a payment of interest to take a debt out of the operation of the Statute of Limitations, it is not essential that money should actually pass between the debtor and creditor. There, after a debt due to the plaintiff from his son had been barred by the statute, the plaintiff, his son, and his son's wife, had an interview at which the interest due was calculated. The plaintiff's son then put his hand into his pocket, as if to get out the money to pay it. The plaintiff stopped him, and writing a receipt for the interest, gave it to his son's wife, saying that he would make her a present of the money. No money actually passed between the parties. It was held, Bramwell, B., dissenting, that this transaction was a sufficient payment to take the debt out of the Statute of Limitations.[2]

So, under a special act, where churchwardens were authorized to borrow money, work done for them was treated as equivalent to a loan; the court holding that where parties agree that a transaction shall have the same result as would exist if money had passed and repassed from one to the other, such agreement will be enforced as in the case where the respective payments had actually been made.[3]

[1] L. R. 2 Ex. 153.

[2] See, also, Ashby *v.* James, 11 M. & W. 542; Ames *v.* Smith, 1 H. & C. 238; Bodger *v.* Arch, 10 Ex. 333.

[3] Regina *v.* Churchwardens of St. Michael, 6 E. & B. 807. And in Blair *v.* Ormond, 17 Q. B. 423, board and lodging were treated as a money payment. See Worthington *v.* Grimsditch, 7 Q. B. 479; Callander *v.* Howard, 10 C. B. 290; Bevan *v.* Gething, 3 Q. B. 740; Chamberlyn *v.* Delarive, 2 Wils. 353.

BOOK IV.

PART V.

EARNEST OR PART PAYMENT.

CLOSELY akin to the subject we have been just considering is the provision in the statute that the contract for the sale of goods, wares, and merchandises, for the price of £10 or upwards, shall be good if the buyer shall "give something in earnest to bind the bargain, or in part payment." And many of the cases we have cited in connection with the preceding section, to show that an exchange or barter comes within the meaning of the word "sale" in the statute, are equally applicable to show that goods as well as money may be given in earnest or part payment to bind the bargain.[1] The very term in the section "give *something* in earnest to bind the bargain, or in part payment," implies this.[2]

[1] See Louden *v.* Birt, 4 Ind. 566, 570; Moore *v.* Stadden, Wright (Ohio), 88; Willard *v.* Germer, 1 Sandf. 50; Tilford *v.* Roberts, 8 Ind. 254; Kuhn *v.* Gates, 92 Ind. 66; Weir *v.* Hudnut, 115 Ind. 525; Hunter *v.* Wetsell, 84 N. Y. 549; Sharp *v.* Carroll, 66 Wis. 62; Walker *v.* Nussey, 16 M. & W. 302; Kearslake *v.* Morgan, 5 T. R. 513.

[2] See *ante*, p. 272 and note 4. In Bach *v.* Owen, 5 T. R. 409, "to make the agreement the more firm and binding," one half-penny was paid "in earnest of the bargain." In Goodall *v.* Skelton, 2 H. Bl. 316, a shilling earnest was paid; and in Blakey *v.* Dinsdale, 2 Cowp. 661, the earnest-money paid to bind the bargain was again a half-penny. In Evans *v.* Roberts, 5 B. & C. 829, the earnest-money was a shilling. In Blekinsop *v.* Clayton, 7 Taunt. 597, the *vendor's* servant, on the contract for the sale of a horse for £45, took a shilling from his pocket, and drew it across the palm of the *vendee's* hand, and replaced the shilling in his own pocket. It was held that as there was no payment, or transfer of the shilling even for a moment, no earnest-money was given. This, by the reporter of the case, and by the text-books generally, is treated as though the act had been that of the purchaser instead of that of the vendor's servant. It was sought to treat the act as a local custom, as equivalent to a part payment or earnest; but it is obvious that, in no respect did it meet the requirements of the statute. The act, such as it was, was not that of the vendee, who is to give the earnest-money or part payment; and there was, in fact, no giving at all. In Weir *v.* Hudnut, 115 Ind. 525, the use of sacks for the sacking of corn was held, as a reduction in the price of the corn from such use of the sacks, to be good as a payment in earnest or part payment to bind the bargain. What the parties agree shall constitute payment, the law will adjudge to be payment. It is competent for parties to designate by their contract how and in what payment may be made. It is by no means true that payment can only be made in money. It may be made in property or in services; or, in short, whatever the parties agree shall constitute payment will be regarded by the courts as payment, provided the thing agreed upon is of some value. Kuhn *v.* Gates, 92 Ind. 66; Tilford *v.* Roberts, 8 Ind. 254. It has been held in many cases that payment in articles of property will bind the bargain and

Benjamin[1] seeks to maintain a distinction between money paid as earnest and as a part-payment, on the ground that earnest is paid

prevent the operation of the statute of frauds. Sharp *v.* Carroll, 66 Wis. 62; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Hunter *v.* Wetsell, 84 N. Y. 549; Combs *v.* Bateman, 10 Barb. 573; Louden *v.* Birt, 4 Ind. 566. In White *v.* Drew, 5 How. Pr. 52, it was held that the giving of valuable information was as effective to take the case out of the statute of frauds as if a cash payment had been made. In Combs *v.* Bateman, 10 Barb. 573, the distinction is taken between a promissory note being given to bind the bargain, as between the vendee's own note and that of a third party. The case was an exchange of a span of horses for two yoke of oxen and a note for $20. The note was delivered. The New York statute differs in phraseology from the 29 Chas. 2, but, under an act providing that the vendee must give "something as earnest to bind the bargain, or in part payment," we think the vendee's own promissory note would meet the requirements of the section; particularly where, under the contract, as in Combs *v.* Bateman, it was one of the terms of the contract that the party's own promissory note was to be taken as a part of the consideration for the horses. See Griffiths *v.* Owen, 13 M. & W. 58, 64. There is an additional point, not noticed in Combs *v.* Bateman, 10 Barb. 573, which would seem to have been sufficient to take the case out of the statute. Under the New York statute (2 R. S. 70, § 3), "things in action" are included with goods and chattels as the subjects of sale, within the statute, the delivery of which takes the case out of the statute. In Combs *v.* Bateman, 10 Barb. 573, there clearly was the sale, or what was equivalent to it, an exchange, and the delivery of a thing in action, under the contract, sufficient to take the case out of the statute. In Krohn *v.* Bantz, 68 Ind. 277, it is held that the vendee's promissory note is neither earnest nor part payment to take an oral sale of goods out of the statute. We are not much impressed with the conclusiveness of the reasoning in this case. The court say that the part payment or earnest must be something of some value, and that the note is of no value because it has no consideration to support it, the sale being invalid. The case seems to some extent to rest on the fact that the note did not appear to be a negotiable note within the statute of Anne, or, as the court call it, not "governed by the law merchant." The case may, on that ground, be distinguished. But in the case of a negotiable note in the hands of a third party, without notice, consideration is implied; and, therefore, the note would be assumed to be of value. And if the delivery of the note is, under the statute, the giving of "something in earnest to bind the bargain, or in part payment," then there is a consideration to support it, even in the hands of the vendor. Where a sale of goods is made, the consideration for which is, expressly, the promissory note of the vendee, the delivery of the very thing — a *chose in action* — which is the express consideration of the sale, and which is itself the subject of a sale, would seem to us to be, without question, the delivery of something in earnest to bind the bargain or in part-payment. So far, in fact, is it payment, that on its receipt, and delivery of the goods, action for the goods is suspended until after its maturity and dishonor. And even after its maturity and dishonor an action will not then lie for the goods as long as the dishonored note is outstanding in the hands of a third party. To that extent it is as a payment between the original parties. Scott *v.* Bush, 26 Mich. 418, is cited to sustain the holding in Krohn *v.* Bantz, 68 Ind. 277. But Scott *v.* Bush was the case of an oral agreement for the sale of lands, and held to be invalid, and, therefore, money paid under the void agreement was held to be recoverable back again, the contract being a mere nullity. Chamberlain *v.* Dow, 10 Mich. 319; Hall *v.* Soule, 11 Mich. 494; Holland *v.* Hoyt, 14 Mich. 238; Grimes *v.* Van Vechten, 20 Mich. 410; Rice *v.* Peet, 15 Johns. 503; Thayer *v.* Rock, 13 Wend. 53; Duncan *v.* Baird, 8 Dana, 101. But there, of course, the part payment would not take the case out of the statute, so there was no question as to what would constitute a part payment. Hooker *v.* Knab, 26 Wis. 511, is also relied on in Krohn *v.* Bantz, 68 Ind. 277. But Hooker *v.* Knab, 26 Wis. 811, was a gaming contract for wheat, there being no written note or memorandum, no part delivery, nor any part of the purchase-money paid. The contract was absolutely void under the statute of frauds, and was so treated by the court. A promissory note was given some six months after the contract, not as earnest or part payment to bind the contract, but in payment of a part of the "difference" arising out of the gaming contract. The contract itself having been a nullity, and the promissory note not having been given to bind the

[1] Benj. on Sales, § 189.

to bind the bargain, while part payment is only made after the bargain has been made or bound. The distinction, however, we

original contract, but merely to meet the consequences of a past invalid contract, was very correctly held, as between the original parties, invalid for want of consideration. The court said: "The parol agreement in respect of the sale of the wheat, however binding it might be in honor, did not create any legal responsibility. In Frey *v.* The City of Fond du Lac, 24 Wis. 204, 207, Mr. Justice Paine says: 'It is a general rule that a promise to pay for a past consideration, for which there is not and never has been any legal liability on the part of the party promising, does not make a contract binding in law. It is placed upon the same footing with a promise which does not purport to be for any consideration whatever.'" So Krohn *v.* Bantz, 68 Ind. 277, so far as it can be considered as holding that the delivery of the vendee's negotiable note is not the giving of something in earnest or part payment to take an oral sale of goods out of the statute, is not supported by Hooker *v.* Knab, 26 Wis. 511, or Scott *v.* Bush, 26 Mich. 418. In New York, there is not only the distinction we have pointed out, that the words "giving something in earnest" have been omitted from their statute, but the words "at the time" are inserted in the statute. We think, however, in principle it is clear, where a sale is made of goods, payable in the vendee's negotiable promissory note, and the note is delivered, that that is such a conditional payment, even "at the time" of the making of the contract, as to take the case out of the statute. It is not, as the assumed non-negotiable note in Krohn *v.* Bantz, 68 Ind. 277, was considered to be, a mere promise to make a payment at a later date; but meets the requirements of the statute, as a delivery of something of value; a *chose in action* which is itself the subject of a sale, and which, as we have seen, is, under the New York statute of frauds, expressly brought within the purview of that statute.

In Parsons on Notes and Bills (vol. ii. p. 206), it is said: "A bill, check, or note has been *held* to be earnest or part payment under the 17th section of the statute of frauds;" but no case is cited to sustain such alleged holding. And in Chitty on Contracts (7th Eng. ed. 377): "The delivery of a bill of exchange or promissory note, on account or in payment of the price of goods sold under a parol contract, will take the case out of the statute, such instrument amounting to payment till dishonored." So, in 10 Petersd. Ab. 129, n., it is said: "The delivery of a bill of exchange or promissory note in part payment would take the case out of the statute." And in Griffiths *v.* Owen, 13 M. & W. 58, 64, Pollock, C. B., states it as undoubtedly established, that, in case of a money demand, if the creditor accepts a promissory note, or an order for the payment of money, on account of the debt, that is a sort of qualified or conditional payment, and may be so pleaded. See Kearslake *v.* Morgan, 5 T. R. 513. In Combs *v.* Bateman, 10 Barb. 573, 575, the court, quoting from Chitty on Contracts, as above, say: "This doubtless refers to a bill of exchange or promissory note of a third person, and not of the purchaser. The delivery of the note of the purchaser can in no sense be said to be a payment. It may suspend the right of action of the seller for the purchase money until the maturity of the note, but the absolute liability of the purchaser remains. Not so, however, *in all cases* of the delivery of the obligation of a third person. That, *when agreed to be taken in satisfaction*, is an absolute payment, and in all cases the purchaser's liability is contingent." But Chitty makes neither of these qualifications. He neither confines the case to that of a bill of exchange or promissory note of a third person, nor to the case where the note or bill of a third person is 'agreed to be taken in satisfaction." And his reason as much applies to the case of a note or bill of the vendee as to that of a third person, such instrument "amounting to payment till dishonored," or, as Chief Baron Pollock calls it, "a sort of qualified or conditional payment;" *i. e.*, in the one case as much as in the other, suspending the right of action till dishonor. The language of Pollock, C. B., clearly implies that the "promissory note, or *an order* for the payment of the money," may be that of the party who gives the note or *the order* for the payment.

In Richardson *v.* Rickman, B. R. Mich., 16 Geo. 3, cited in Kearslake *v.* Morgan, 5 T. R. 513, 517, it was held that a plea, in an action for goods sold and delivered, of the delivery of the vendee's bill on a third party to the vendors, on which the vendees remained liable, was good; even though a bill of exchange, unless there is an agreement that it shall be so, is not satisfaction. So, in Kearslake *v.* Morgan, 5 T. R. 513, in assumpsit for goods sold and delivered, the delivery of the promissory note of a third party in favor of the defendant, and indorsed by him to the plaintiff, was held to be a good

think, is even finer than the nice legal distinction sometimes sought to be made between a sale and a barter or exchange, which, as we

conditional payment, although not an actual extinguishment of the debt. See also Tapley *v.* Martems, 8 T. R. 451; Louviere *v.* Laubray, 10 Mod. 36. In Chamberlyn *v.* Delarive, 2 Wils. 393, in an action for work and labor, the evidence showed that the defendant had given his own draft on a third person to the plaintiff for the amount of the claim; and the court, without deciding whether or not the instrument was a bill of exchange or negotiable, held that this was a qualified payment, which became an absolute payment when the amount of it was lost, through the laches of the plaintiff, on the failure of the drawee. So, in Burney *v.* Poyntz, 4 B. & Ad. 568, where the vendee gave his own promissory note to the vendor's agent for hay, this was held to be substantially a payment, which destroyed the vendor's lien on the hay for the purchase-money. This case we consider in effect an express authority that the giving of his own promissory note by the vendee to the vendor will take the case out of the statute, as the giving of something in earnest or in part payment. And see Horncastle *v.* Farran, 3 B. & Ald. 497, — another case of the destruction of a lien by the acceptance of a bill of exchange.

Where a note or bill is taken in full satisfaction and discharge of a debt, the remedy is solely on the note or bill, the right of action on the original cause of action being extinguished. Sard *v.* Rhodes, 1 M. & W. 153; Frisbie *v.* Larned, 21 Wend. 451; Peter *v.* Beverley, 10 Pet. 534, 568; Lewis *v.* Lyster, 2 C. M. & R. 704. But where, as in Kearslake *v.* Morgan, 5 T. R. 513, it is taken "for and on account of" the original debt, and not in full satisfaction and discharge of it, as it may be if the parties so agree, on the dishonor of the note or bill the original cause of action revives. In the one case it is an absolute payment; in the other, a qualified or conditional payment. See Herring *v.* Sanger, 3 Johns. Cas. 71; Chapman *v.* Steinmetz, 1 Dall. 261; Tyson *v.* Pollock, 1 Penn. 375, 381; Dayton *v.* Trull, 23 Wend. 345; Tobey *v.* Barber, 5 Johns. 68; Johnson *v.* Weed, 9 Johns. 310; Woodcock *v.* Bennett, 1 Cow. 711; Sheey *v.* Mandeville, 6 Cranch, 253; Newell *v.* Hussey, 6 Shep. 249; McGinn *v.* Holmes, 2 Watts, 121; Bill *v.* Porter, 9 Conn. 23; Cave *v.* Hall, 5 Mo. 59. In either case, we think, it is clearly a giving of something in earnest to bind the bargain, or in part payment to satisfy the 17th section of the statute. In Clark *v.* Mundal, 1 Salk. 124, it was held, that if A. sell goods to B., and B. is to give a bill in satisfaction, B. is discharged though the bill is never paid, "for the bill is payment," — absolute if received in satisfaction; conditional payment if not received in full satisfaction and discharge. By 3 & 4 Anne, c. 9, § 7, a bill of exchange received for a debt was made "a full and complete payment of such debt" where there were laches by the holder. So, in New York, in Waydell *v.* Luer, 3 Den. 410, it was held, where a member of a co-partnership gave his own promissory note for a debt of the firm, as payment and in satisfaction of the debt, it extinguished the original indebtedness. In Ireland *v.* Johnson, 28 How. Pr. 463, 13 Abb. Pr. 392, the decision in Combs *v.* Bateman, 10 Barb. 574, is followed by Prindle, county judge, who held, reversing the decision of the Justice's Court, that where a sale of a machine was made, for which, as the express condition of the sale, the vendee's promissory note was to be taken, which was given and received, this did not take the case out of the statute. The county judge rested his judgment on two grounds: (1) that the promissory note was only a promise, and amounted to no more than a promise by the vendee to give credit on his books to the vendor for a previous indebtedness; and (2) that, as the note was not an absolute extinguishment of the debt, therefore it was not a payment of it. But a negotiable promissory note is more than a mere promise. It is an assignable *chose in action;* a commercial commodity; the subject of a sale; and, in the New York statute, is classed with goods and chattels as the subject of a sale equally with them, and requiring, to consummate the sale, the same kind of evidence. Besides, it was the identical thing which was agreed upon as the consideration for the sale of the machine, and was, unquestionably, a valid consideration for such sale. And while it is not, as payment, an absolute extinguishment of the debt, neither is the negotiable note or bill of exchange of a third party, unless under facts which show that it has been received as such. Kearslake *v.* Morgan, 5 T. R. 513; Vasteenburgh *v.* Hoffman, 15 Barb. 28; Burdick *v.* Green, 15 Johns. 247; Hughes *v.* Wheeler, 8 Cow. 77; Conro *v.* Port Henry Co., 12 Barb. 27; Waydell *v.* Luer, 3 Den. 410, and other authorities cited by us above. But it is, in the one case as in the other, a qualified or conditional payment, suspending the original cause of action, and entirely extinguishing it, and becoming an absolute payment of such

have shown,[1] has practically no existence. But earnest money was never paid until the bargain had been made; and, unless

original cause of action, on the due payment of the note or bill at maturity. We think it is obvious that the giving of the vendee's own negotiable note or bill of exchange, or that of a third party, to the vendor, and accepted by him for and in consideration of goods sold, is a giving of something in earnest or part payment to take the case out of the statute; and that the few cases in this country which hold otherwise are decided on unsound grounds, and, on principle as well as on the weight of authority, cannot, we think, be sustained.

The vendee's giving another's promissory note would be giving but another's promise to pay something in the future; or his giving another's bill of exchange would be only giving the order of another to pay something in the future, and his check would be simply a direction to others to pay something. If giving his own negotiable note, or his own bill of exchange, would not be such a payment as would take the case out of even such a statute as the New York statute of frauds, because it is merely his promise or order to pay something in the future, and not actual absolute payment itself; giving another's promissory note, or another's bill of exchange, would be no better an actual payment "made at the time;" as it would be not only an order or promise to pay something in the future; but, as the act of a third party, it would be really one degree further removed from the giving something in earnest, or in part payment, by the vendee, than his own promissory note or bill of exchange itself would be. We think the position that the promissory note or bill of exchange of the vendee, delivered by him and accepted by the vendor, as a *quasi* or conditional or qualified payment, will not take the case out of the statute of frauds, is entirely untenable. As before intimated, such a payment would usually be an exact fulfilment of the very terms of the contract of sale; and when the note or bill is paid, delivered, and received, as the agreed conditional payment for the goods, we think it would as effectually take the case out of the statute as it would suspend the right of action on the original contract.

In Organ *v.* Stewart, 60 N. Y. 413, where there was a payment made on account of a purchase of wool, the payment being made concurrently with a new purchase of wool, it was thought to engraft upon the original contract the new purchase, so as to make the payment on the first contract a payment to take the second out of the statute of frauds. But the court held that, although the purchasers paid their indebtedness for the wool first purchased in consequence of the new agreement, this was not a payment on the new contract; the payment, under the statute, to validate a contract, must be the payment of a part of the purchase-price of the goods sold by the contract sought to be enforced. In this case the vendors only consented to sell the second lot of wool on condition that they were paid for the first lot. They were paid for the first lot, but the payment for that was not the giving anything in part payment for the second lot, the payment for the first lot forming no part of the payment for the second, but was simply a payment in full of the exact amount due for the first lot, so that, had the second lot been delivered, the entire purchase-money of that lot would have remained unpaid, showing that no part of it had been paid. But in Allen *v.* Aguirre, 7 N. Y. 543, where the defendants sold the plaintiff a quantity of damaged raisins by verbal agreement, the plaintiffs paying for the raisins and receiving them; the plaintiffs to have the benefit of, and to be paid by the defendants, the amount of such return duties as the government should allow the defendants. The defendants received $862.51 from the government for return duties, which they refused to pay to the plaintiffs, alleging that the contract was within the New York statute of frauds, as the sale of a thing in action within the meaning of the statute. But the court held that the agreement for the reduction of the return duties was, in effect, that the return duties were to be a part of the price of the raisins, and that the delivery of the raisins took the case out of the statute. On another ground, too, which was the very ground taken by the defendants for seeking to avoid the return of the duties to the plaintiffs, the decision was correct. If the purchase of the raisins and of the right to the return duties was, as was in effect claimed by the defendants, a purchase of goods and a right of action, the price paid was for both of these; and as the sale of goods and things in action are alike within the very terms of the New York statute, the payment itself, independent of the delivery, was sufficient to take the case out of the statute, as well as to the thing in action — the right to the return

[1] See Vol. I., Book I., Part I.

earnest money has been paid, or one of the other clauses of the seventeenth section of the statute has been acted on to take the case out of the statute, the effect of a *payment*, whether it be called "earnest" or "part payment," is to "*bind* the bargain," and without such payment, whether it is called "earnest" or "part payment," there is no bound contract. So the distinction is purely imaginary.[1]

of the duties — as to the goods. Munsell *v.* Lewis, 2 Denio, 224, is in principle, though not a decision under the statute of frauds, analogous to Allen *v.* Aguirre, 7 N. Y. (3 Seld.) 543. And see McFarland *v.* Crary, 6 Wend. 297; Henry *v.* Bank of Selina, 5 Hill, 523; Wheeler *v.* McFarland, 2 Denio, 183.

[1] Under the statute of frauds the contract is alike bound by whatever is given or paid as earnest or part payment. The term giving something "in earnest to bind the bargain" was a colloquialism in common use in England before the enactment of the statute of frauds, and was simply introduced into the statute as a term in connection with sales of personal property then commonly in use. The term "earnest" appears in Pordage *v.* Cole, 1 Saund. 319, which was decided in 20 & 21 Car. 2, or some nine years before the statute of frauds was enacted, and is there treated as synonymous with part payment. There the plaintiff had given five shillings "as an earnest," and the action was for *the residue* of the purchase-money; that is, £774 15*s.* of the total purchase-money of £775. So, in Langfort *v.* Adm. of Tiler, 1 Salk. 113, where there was a payment of £50 on account of three tubs of butter purchased, the payment of this large portion of the purchase-money is called "earnest." And in Walker *v.* Nussey, 16 M. & W. 302, where the question was whether there had been a payment of £4 14*s.* 11*d.* on a purchase amounting to £20 18*s.* 11*d.*, Pollock, C. B. (at p. 304), and the other judges put the question as to whether what took place amounted to "a giving of earnest or in part of payment," treating the terms as entirely synonymous. In Morton *v.* Tibbett, 15 Q. B. 428, too, the terms are treated as being essentially the same: "The payment of any sum in earnest to bind the bargain, or in part payment, is sufficient. . . . Part payment, however minute the sum may be, is sufficient." In Blenkinsop *v.* Clayton, 7 Taunt. 597, the terms are treated as convertible. There the question was whether a custom well understood in the north of England, called "the striking of the bargain," and which was closely akin to the old common-law practice in force in England of "giving something in earnest to bind the bargain," was such a *part payment* as complied with the statute of frauds. There the defendant offered £45 for a horse, which the plaintiff's servant agreed to accept; and, taking a shilling in his hand, drew the edge of it across the defendant's hand, and replaced the shilling in his own pocket, which the witnesses called "striking off the bargain." From the marginal note of the case this seems to be treated, under the local practice or custom in the north of England, as though equivalent to the giving of earnest money by the purchaser, but the court held that as there never was any payment or transfer of the shilling even for a moment, it was not a part payment within the statute; that is, that the transaction did not amount to the giving of earnest, or in part payment, to satisfy the statute. In Howe *v.* Hayward, 108 Mass. 54, the parties made an oral contract for the sale and purchase of the stock of a livery stable, and each of them deposited $200 in the hands of a third party. The plaintiff contended that the money deposited by the defendant was given in earnest to bind the bargain or in part payment. The defendant contended that it was under an agreement that the sum should be forfeited in case he refused without just cause to perform the contract. The jury found that it was not deposited in earnest or in part payment, but was deposited as a forfeiture; and under the instructions of the court, the action being for breach of the contract to buy the stock, they found for the defendant. The plaintiff claimed that as the money was deposited as a forfeiture it amounted to "earnest" within the statute of frauds. But the court held that it was not a part payment, and as the term "earnest," as used in the statute of frauds, is regarded as a part payment of the price, it was not, therefore, equivalent to an earnest to bind the bargain, or part payment, and there was not a valid sale within the statute of frauds.

Usually what was given at the time of the sale under the old English practice, which was recognized in the statute, was called "earnest," although, as we have seen by the cases above cited, whatever

Earnest and part payment were considered in effect the same even before the statute, at common law. Thus Blackstone says: "If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they are neither of them at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of earnest (which the civil law calls *arrha*, and interprets to be '*emptionis venditionis contractæ argumentum*'), the property of the goods is absolutely bound by it; and the vendee may recover the goods by action, as well as the vendor may the price of them. And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute, 29 Car. 2, c. 3, no contract for the sale of goods, to the value of £10, or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; unless he gives *part of the price* to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. Anciently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *handsale*, '*venditio per mutuam manuum complexionem*;' till in process of time the same word was used to signify *the price or earnest*, which was given immediately *after the shaking of hands*, or instead thereof." [1]

was given in earnest was equally a part payment, and, as such, was deducted from the total purchase-money. The case of Bissell *v.* Balcom, 39 N. Y. 275, well illustrates the unsoundness of the distinction Benjamin has taken between earnest and part payment. There the plaintiff orally sold the defendant cattle for $290. A day or two after this verbal sale the plaintiff met the defendant, and wished some money from him, saying that "it is best that we *bind the bargain*, so that there will be no chance to back out." The defendant then paid the plaintiff $3. While this was expressly given "to bind the bargain," — the words used in the English statute in connection with earnest, — it was held a good part payment under the New York statute, and it, with $2 paid later by the defendant to the plaintiff, was deducted from the gross amount of the purchase-money. In the New York statute of frauds there is no reference to earnest, but the effect of any payment "to bind the bargain," if made, under the New York statute, "at the time" of the bargain, is precisely the same as under the English statute, where the term "earnest" is used; adopted, as we have seen, as a colloquialism in common use in England at the time of the enactment of the statute, and, in fact, for hundreds of years prior to the passage of the act.

[1] 2 Bl. Com. 447.

Like very much of our commercial law, earnest was derived from the civil law. Pothier says of it, "Earnest is accustomed to be given by the buyer to the seller, *in order to serve as a proof that the bargain is concluded.* And therefore Cujas defines it, *quod ante pretium datur, et fidem facit contractus facti, totisque pecuniæ solvendæ.* It is not of the essence of the contract of sale, which may be made without the giving of earnest, since the parties may agree upon some other mode of proof than that which results from earnest. The earnest given by the buyer sometimes consists of a sum of money; in which case it is considered to be given *on account of and to be deducted from the price* which the buyer is obliged to pay. The people in our province call this kind of earnest money of adieu, because it is a piece of money given by the buyer to the seller *after having concluded the bargain*, separate and say adieu. Sometimes the buyer gives some other thing than money as earnest. The Romans had a custom of giving a ring. The seller in this case has the right to retain, as a sort of pledge, the thing given as earnest, until he is entirely paid. When he has been entirely paid, he ought to render it to the buyer. The law gives the buyer, in this case, an action for a recovery of the earnest."[1]

Our own old common-law writers are to the same effect. Noy, who wrote in the beginning of the seventeenth century, says, "If the bargain be, that you shall give me ten pounds for my horse, and you give me one penny in earnest, which I accept, this is a perfect bargain; you shall have the horse by an action on the case, and I shall have the money by an action of debt."[2]

A much earlier common-law writer, who wrote in the thirteenth century, says, "A purchase and sale is contracted when the price has been agreed upon between the parties contracting, provided that something has been received by the vendor in the name of earnest; for what is received in the name of earnest is an argument of a contract for purchase and sale. And if a writing

[1] Pothier on Sales, p. 6, c. 1, pl. 506, 507.

[2] Noy's Max., c. 42. "If a man by word of mouth sell to me his horse, or any other thing, and I give him, or promise him nothing for it, this is void, and will not alter the property of the thing sold. But if one sell me a horse, or any other thing, for money, or any other valuable consideration, and the same thing is to be delivered to me at a certain day, and by our agreement a day is set for the payment of the money, or all or part of the money is paid in hand, or I give earnest money (although it be but a penny) to the seller, or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, — in all these cases there is a good bargain and sale of the thing to alter the property thereof; and in the first case I may have an action for the thing, and the seller for his money; in the second case I may sue for and recover the thing bought; in the third I may sue for the thing bought, and the seller for the residue of the money; in the fourth case, where earnest is given, we may have reciprocal remedies, one against another; and in the last case the seller may sue for his money." Sheppard's Touchstone, 224.

ought to intervene, the purchase and sale will not be perfect, except when it shall be delivered to the parties and completed. And when earnest-money has not intervened, nor a writing, and delivery has not followed, there will be a place for repentance, and the contracting parties may with impunity recede from the contract. But if the price has been paid, or a part of it, and delivery has followed, the purchase and sale will be complete, nor can any of the contracting parties recede from the contract, under the pretext of the price not having been paid in part or in whole." [1]

It will thus be seen that the giving of earnest or part payment "to bind the bargain," was derived by the common law from the civil law, and the seventeenth section of the Statute of Frauds is little more than declaratory of the common law. There is, however, one feature of the old common law with respect to earnest or part payment which is no longer in force. Formerly, adopting the view of some of the old civil-law writers, it was a feature of the common law that when, in the name of earnest-money, anything had been given before delivery of the subject of the purchase, if the purchaser repented of his purchase and wished to recede from his contract, he could do so upon losing what he had given; and if the vendor repented, he could only be relieved of his contract by restoring double of what he had received as earnest-money.[2] The payment of earnest-money was thus

[1] Bracton, b. 2, c. 27, f. 61.

[2] Bracton, b. 2, c. 27, f. 61, 62. It was a question among the civil-law doctors, when the seller received earnest, after the contract of sale was concluded, whether each of the parties might compel the other to execute his obligation, and, in default thereof, might cause the other to be condemned in all the damages and interests resulting from its non-execution in the same manner as if no earnest were given; or whether it was in the power of the buyer to discharge himself from his obligation by offering to lose the earnest; and in that of the seller to desist in like manner from his own by offering to pay double the earnest. This view was held by Fachineus (lib. II. controv. 28) and the doctors cited by him, as their deduction from the Institutes and the Code of Justinian. But Weissembach, Vinnius, and Pothier were of the opposite opinion. The views of the former were adopted, as we have seen, by Bracton. Pothier makes the distinction that, under the civil law, there were two descriptions of payment of earnest-money; one where it was given at the time a contract was only projected, and not concluded, and which answered with us to the case where a sum was to be forfeited if a proposed agreement were not carried out; and the other where, as with us under the statute of frauds, the payment is made at or after the completion of the contract. Pothier thus deals with these questions: "In the case of earnest given at the time of a contract only projected and not concluded, it is clear that the buyer, who refuses to conclude the bargain, is discharged from his obligation by a loss of the earnest, and that he cannot be constrained to a payment of the price, since the bargain not being yet concluded he has not yet contracted the obligation to pay it. For the same reason we can demand nothing more than double the earnest of the party who receives it, since he is not yet obliged to a delivery of the thing; but it ought to be otherwise, when the earnest is given after the conclusion of the bargain. The buyer may, in that case, be constrained to a payment of the price, since he is under an obligation to pay it; and, for the same reason, the seller may be constrained to deliver the thing, and in default of being able to deliver it may be condemned in all the expenses, damages, and interests of the buyer; and neither of the parties can be

treated more like a forfeiture, as in the case of Howe *v.* Hayward,[1] than as it is now, a payment absolutely to bind the bargain without the option of having it treated simply as a forfeiture.[2]

Under the English statute, and under such other statutes as are in effect the same as it, the giving of earnest or part payment of the purchase-money to bind the contract, may, like the part delivery of the goods, or the signing of the memorandum, be either at the time of the making of the contract, or at any reasonable time subsequent thereto, — a reasonable time, in the absence of the cancellation of the contract in the mean time, being at any time before action is brought on the contract.

Blackstone, correctly we think, treats the delivery of part of the goods by the vendor as "earnest" to bind the sale, just as he treats payment of a part of the price by the vendee as "earnest to bind the bargain." His language is, "No contract for the sale of goods to the value of £10 or more shall be valid unless the buyer actually receives part of the goods sold by way of *earnest* on his part; unless he gives *part of the price* to the vendor *by way of earnest*," etc.[3]

Thus, many of the decisions relative to the part delivery of the goods as "earnest" to bind the bargain are equally applicable to the payment of part of the price as earnest for the same purpose. Cooper *v.* Elston[4] holds, that where there had been a sale by

discharged from his obligation, though the one offers to lose the earnest, or the other to pay double the amount. As the earnest is given in this case in order to confirm the contract, and to render it more certain and known, it would be absurd to give it an effect to destroy the contract by destroying the obligations, rights, and actions which result from it. . . . Though the buyer, who, after the conclusion of the bargain, gives earnest, refuses to execute the bargain and to pay the price, if he is, notwithstanding, constrained to pay and does pay it, he ought not to lose the earnest, which ought to be restored to him, or, if it consist of a sum of money, to be deducted from the price; for it is only in case of a non-execution of the bargain by his refusal that he ought to lose it; but when he pays it, though by constraint, the bargain is executed. There is more difficulty when the seller does not really execute the contract, but is condemned, in default of executing it, to the damages and interests of the buyer. I think that even in this case the buyer can claim nothing more than a return of the earnest, and not a restitution of double the amount; for the restitution of double the earnest being a penalty, which stands in the place of the damages and interests resulting from the non-execution of the contract, the buyer would cause himself to be twice paid for the same thing if, after being fully satisfied for his damages and interests, he could also compel a restitution of double the earnest, contrary to the rule of equity. *Bona fides non patitur ut bis idem exigatur.* Dig. 50, 17, 57." Pothier on Sales, p. 6, c. 1, pl. 508, 509. The law with us under the statute of frauds is exactly as it was claimed by Weissembach, Vinnius, and Pothier, to have been by the civil law with respect to payments of earnest-money or part payment to bind a contract, which has not been merely proposed, but has been concluded.

[1] 108 Mass. 54.

[2] In Neil *v.* Cheves, 1 Bail. (S. C.) 537, after the payment of fifty dollars as earnest-money on account of the purchase-money of cotton, the property in the cotton not having vested in the vendee; where the court held, under the facts, that the vendor had the right to rescind the contract, it was also held that the vendee was entitled to recover back the fifty dollars. Parker *v.* Steward, 34 Vt. 127, is to the same effect.

[3] 2 Bl. Com. 448.

[4] 7 T. R. 14.

sample of fifty quarters of wheat, the delivery of the sample, which was no part of the fifty quarters which were to be delivered, was not sufficient to bind the bargain so as to take the case out of the statute. The delivery of the sample was not made until two days after the day of the sale; but the court imply that, notwithstanding this, had the sample been a part of the goods which were to be delivered, this *post* delivery would have taken the case out of the statute. So in Damon *v.* Osborne,[1] where a quantity of bricks was sold, and it was claimed that the case was within the Statute of Frauds, because the value of the goods contracted for exceeded £10, and there was no earnest paid, no contract in writing, and no part of the goods was delivered *at the time of the sale;* the court held that a delivery of part of the goods within a reasonable time *after the sale* would have been sufficient to have taken the case out of the statute.

In Whitwell *v.* Wyer,[2] a quantity of rum was sold, none of it being then delivered, no payment being made to bind the bargain, nor any memorandum of the agreement being made. Nine days after the date of sale the vendees made a part payment of £1000 on the price. The court held that this payment established a contract which might be enforced, notwithstanding the provisions of the statute; and that what took place between the parties at the time of the part payment was incorporated into and became a part of the original contract, as it only then became a contract which the law would enforce.

In Townsend *v.* Hargraves[3] the court sustained an action on a verbal contract where there had been a delivery of part of the goods several days after the time the contract was entered into. The court there held, that except that the statute provides that no action shall be brought, there would be no good reason to hold that a memorandum signed, or an act of acceptance proved, at any time before the trial, would not be sufficient.

It was claimed in Bill *v.* Bamont[4] that part acceptance of the goods, earnest, or part payment would take the case out of the statute, where either of those acts had been performed even after action brought. But the court held otherwise, Parke, B., saying: "With regard to the point that a memorandum in writing after action brought is sufficient, it is certainly quite a new point, but I am clearly of opinion that it is untenable. There must, in order to sustain the action, be a good contract *in existence at the time of action brought;* and to make it a good contract under the statute, there must be one of the three requisites named. I think, there-

[1] 1 Pick. 476.
[2] 11 Mass. 6.
[3] 118 Mass. 325.
[4] 9 M. & W. 36.

fore, that a written memorandum, or part payment, after action brought, is not sufficient to satisfy the statute." *Ergo*, if done before action brought at least within a reasonable time after the verbal contract is entered into, it is sufficient to satisfy the statute. See Tisdale *v.* Harris[1] as to a memorandum signed several days subsequent to the verbal contract.

So, in Leather Cloth Co. *v.* Hieronimus[2] a memorandum in writing made by the defendant, after the goods had been delivered to a carrier and been totally lost at sea while in his hands, was held sufficient to take the case out of the statute.[3]

And in Marsh *v.* Hyde[4] the facts showed a completed sale by oral agreement, with an acceptance and receipt of part, subsequent in point of time to the original contract, which was held to take the case out of the statute. But where a subsequent acceptance of a part is relied on to take the case out of the statute, it must appear that such acceptance was with an intention of the buyer to perform the whole contract, and to assert the buyer's ownership under it over the whole subject of the verbal sale; and, where the contrary of this appears, the accepting of a part will not take the case out of the statute as to the residue.[5]

In New York, Wisconsin, and a few of the other States, the language of the seventeenth section of the English Statute of Frauds has been materially departed from with respect, *inter alia*, to the payment of part of the purchase-money to take the case out of the statute. By the New York statute[6] it is enacted that every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall, *at the time*, pay some part of the purchase-money. This statute, while leaving the clauses as to the effect of the note or memorandum in writing, and as to the acceptance and receipt of a part of the goods, substantially as in the English statute, requires — different from the English statute, and from that of the most of the States — that the payment of some part of the purchase-money should be "*at the time*" of the making of the contract.

Here "earnest" is omitted; but, as we have seen, as the payment of earnest is in effect the same, under the statute, as a part

[1] 20 Pick. 9.
[2] L. R. 10 Q. B. 140.
[3] Analogous facts existed relative to part acceptance in Townsend *v.* Hargaves (*supra*), 118 Mass. 325.
[4] 3 Gray, 331.
[5] Atherton *v.* Newhall, 123 Mass. 141; Remick *v.* Sandford, 120 Mass. 309.
[6] R. S. 136, § 3.

payment of the price, this is not material. But the provision that the part payment of the purchase-money to take the case out of the statute, must be "*at the time*" of the contract, is a substantial variation from the statute of Charles 2. Thus, while, as in England, the subsequent signing of a note or memorandum in writing, and the subsequent acceptance and receipt of a part of the goods, will, in New York, and in the other States in which a similar provision to that in the New York Statute of Frauds is adopted in their statutes, take the case out of the statute, the subsequent part payment of the purchase-money will not have that effect. This, too, in effect shows, that, under the English statute, or other of a similar character, the subsequent payment of part of the purchase-money will take (as we have shown that it will) the case out of the statute, equally with the *post* signing of the note or memorandum in writing, or the *post* delivery and acceptance of a part of the goods.

In so, in effect, deciding, in an early case under the New York statute, the Supreme Court of that State only with some hesitation accepted the reading of the New York act as regards the necessity of the part payment "at the time," in order to take the case out of the statute. They held, in accordance with the English cases, that, where a contract is made for the sale of an article of merchandise at a stipulated price, although the contract be void under the Statute of Frauds, the price agreed upon may be recovered, if the article be subsequently delivered and accepted; and that a subsequent acceptance in whole or in part of the article agreed to be sold, renders the contract valid.[1]

The Massachusetts Supreme Court, in Marsh *v.* Hyde,[2] noticed the distinction between the New York statute and those statutes which are similar to the 29th Charles 2. Mr. Justice Bigelow, in delivering the judgment, said: "There is nothing in the statute which fixes or limits the time within which a purchaser is to accept and receive part of the goods sold, or give something in

[1] Sprague *v.* Blake, 20 Wend. 61. In so holding the court said: "On a delivery, without any change of terms, even of part, a previous proposition to pay a certain price becomes binding. The part delivery need not, by the statute, be made at the time of the contract. An oral agreement may stand for a mutually agreed proposition, and unless revoked the subsequent acceptance of part of the goods which were the subject of the oral negotiation will make it binding. The statute does not require that the part acceptance should be *at the time* of the oral contract, though it *seems* to be otherwise of earnest-money which is to bind the bargain." 2 R. S. 70, § 3. It will also be noticed that, in this case, the court call the part payment "earnest," although, as we have seen, that word is omitted from the New York statute. Hart *v.* Sattley, 3 Camp. 528; Chaplin *v.* Rogers, 1 East, 192; Vincent *v.* Germond, 11 Johns. 283; Jennings *v.* Webster, 7 Cow. 256; Outwater *v.* Dodge, 6 Wend. 397, 400, and many other authorities, show that a subsequent receipt and acceptance by the purchaser or his agent of the goods, in whole or in part, under an oral contract, takes it out of the statute.

[2] 3 Gray, 331.

earnest to bind the bargain, or in part payment. It would fully satisfy its terms if the delivery or part payment were made in pursuance of a contract previously entered into. In New York it is expressly provided that the part payment under the contract shall be made 'at the time.' But no such language is found in any part of our statute. Nor can we see any good reason for implying that any such limitation was intended by its provisions."

And, dealing with the general question, the same learned judge, in the same case, further said: "It is the fact of the delivery under and in pursuance of an agreement of sale, not the time when the delivery is made, that the statute renders essential to the proof of a valid contract. It is to be borne in mind that, in all cases where there is no memorandum or note in writing of the bargain, the verbal agreement of the parties must be proved. The statute does not prohibit verbal contracts. On the contrary, it presupposes that the terms of the contract rest in parol proof, and only requires, in addition to the proof of such verbal agreement, evidence of a delivery or part payment under it. It does not therefore change the nature of the evidence to be offered in support of the contract. It merely renders it necessary for the party claiming under it to show an additional fact in order to make it 'good and valid.' The argument is a fallacy which assumes that the contract takes its legal force and effect from the time when its terms are verbally agreed upon; and that therefore, being void when made, it cannot become valid by any subsequent act of the parties. It would be more correct to say, that, until the formalities required by the statute are complied with, there is no legal and valid contract entered into. The terms verbally agreed upon between the parties amount to little else than a proposition for a contract; and it is not until delivery of part of the goods takes place, or part payment is made, that it assumes the qualities of a legal contract, in the same manner as the written memorandum of the previous verbal agreement of the parties becomes in law the binding agreement between them. It is not, therefore, the subsequent delivery of goods which gives vitality and force to a contract previously void. Until the delivery is made, no binding contract exists; and when it takes place, the act of the parties unites with their previous verbal understanding to create a full, complete, and obligatory agreement. In all cases like the present, a single inquiry operates as a test by which to ascertain whether a contract is binding upon the parties under the Statute of Frauds. It is whether the delivery and acceptance, whenever they took place, were in pursuance of a previous agree-

ment. If the verbal contract is proved, and a delivery in pursuance of it is shown, the requisites of the statute are fulfilled." [1]

In McKnight *v.* Dunlop,[2] it was contended that the acceptance and receipt, some two months after the making of an oral contract, of part of the goods, did not take the case out of the New York statute. But the Court of Appeals there, following the decision in Sprague *v.* Blake,[3] held otherwise.[4]

A case in Massachusetts [5] is the first case we have found in which judicial construction has been given to the clause in the New York statute providing that the part payment, to take the case out of the statute, must be made "at the time" of the contract. In this case a parol contract for the sale of stock was made in New York. The first conversation between the parties took place on August 21, when the terms of the sale were verbally agreed on, the parties then parting, the purchaser agreeing to take the stock at the price and terms agreed on, but saying that he would not have time to close the contract on that day, but would close it in a few days. Payments were subsequently made on account of the purchase-money in September and November following. The court construed the clause in the New York statute to mean that the payment was not restricted to a payment made at the precise period of making the verbal agreement. The court, however, went much farther than this, and held that while, until the part payment was made, neither party would be bound by its terms, the vendee would be under no obligation to make a payment, and the vendor under no obligation to receive one. But when actually made and accepted with the full concurrence of both parties, then the contract takes effect; then a part payment

[1] See Elliott *v.* Thomas, 3 M. & W. 170; Scott *v.* Eastern Counties Ry., 12 M. & W. 33; Vincent *v.* Germond, 11 Johns. 283; Davis *v.* Moore, 13 Me. 424.

[2] 1 Seld. 537.

[3] 20 Wend. 63.

[4] The court there, referring to the New York statute of frauds, said: "If part payment of the purchase-money is relied upon to except the contract from the operation of the statute, it must, by the terms of the statute, be made at the time the contract is entered into. But when the validity of the contract depends upon the acceptance and receipt of a part of the goods, the statute omits to require the acceptance and receipt to be at the time of the making of the contract. The old statute of frauds did not specify the time when either the goods were to be accepted and received, or a part of the purchase-money was to be paid. (1 N. Y. R. L. of 1813, 79, § 15.) The chapter of frauds, as reported by the revisers, required as well the acceptance and receipt of a part of the goods, as the payment of a part of the purchase-money, to be at the time of making the contract. The legislature struck out of the sub-division as reported, in relation to the acceptance and receipt of a part of the goods, the words 'at the time,' which confined the acceptance and receipt of the goods to the time the contract was entered into. This action of the legislature is a very clear indication of their intention to provide that a contract for the sale of goods for the price of $50 or more should be valid, if a part of the goods sold were accepted and received under and in pursuance of the contract, although after the time of making it. And this is the judicial construction which has been given to the statute." Sprague *v.* Blake, 20 Wend. 63, stated *supra*.

[5] Thompson *v.* Alger, 12 Met. 428.

of the purchase-money has been made; and then the parties have made a valid contract.

The Massachusetts Supreme Court, after having so held, say: "This would seem to be a very reasonable construction of the statute, if it was necessary to decide the abstract question of the effect of payment of the purchase-money after the time of entering into a verbal contract." We think, had the court been construing the English statute, or any of the statutes which are in effect the same as it, their exposition of the law would have been quite accurate. But, in such exposition, we think they entirely failed to give any weight to the clause in the New York act, and in similar acts, which, in effect, provides that the payment must be made "at the time;" *i. e.* at the time of the making of the contract. In Thompson *v.* Alger,[1] however, such holding as above was a mere *obiter dictum*. The case actually turned upon the fact, that, at the time of the first part payment in September, there was a new and further negotiation of the parties; a renewal of the contract, with a new agreement as to the time of transferring the shares; and "at the time" of the making of this last agreement, which was the one the plaintiff sought to enforce, the first part payment was actually made, as a part of the purchase-money of the shares which by the agreement were to be conveyed. The court, very properly, we think, held, that these facts presented a case of part payment which brought the case within the third class of exceptions from the operation of the New York Statute of Frauds; more particularly as the contract was subsequently recognised by both parties to it as an existing and valid one, and as such was acted upon by them.

The case of Thompson *v.* Alger[2] was recognised by the New York Court of Appeals, in McKnight *v.* Dunlop,[3] and the principles in it, with the following rider, thus correctly laid down: "If the contract is not in law deemed to be made until the part-payment of the purchase-money, and the previous invalid oral agreement is merely referred to, to ascertain the terms of the subsequent valid contract, the decision of the Supreme Judicial Court of Massachusetts may be regarded as sound."

The first New York case in which the question under the third exception in the New York statute was directly decided, seems to be Bissell *v.* Balcom.[4] This was an action for the price of cattle for more than $50, under a verbal contract. No part of the purchase-money was paid at the time of the alleged contract of sale. After the contract was concluded, the defendant asked

[1] 12 Met. 428.
[2] *Ibid.*
[3] 1 Seld. 537.
[4] 40 Barb. 98.

the plaintiff if he wanted any money to bind the bargain; to which the plaintiff replied, that he did not care about it at that time, as their words were good for the bargain. The defendant then went home, and nothing was said or done on that day on the subject of payment by the defendant of anything on the contract. In a day or two after, the plaintiff asked the defendant for five dollars to bind the bargain, expressly saying, "It is best we bind the bargain, so there will be no chance to back out," when the defendant paid him three dollars, and in about two weeks afterwards he paid him two dollars more. The court held that this did not take the case out of the statute, and, in doing so, took the same view of the decision in the Massachusetts case which we have done.[1]

But, on appeal to the Court of Appeals, this decision was reversed; without, however, going as far as was done in the *dictum* of the Massachusetts case of Thompson *v.* Alger,[2] that any subsequent payment actually made and accepted with the concurrence of both parties, was to be deemed as made "at the time" of the making of the contract within the third exception in the New York statute.

In Bissell *v.* Balcom,[3] the court, on appeal, took the middle

[1] Welles, J., in delivering the judgment of the majority of the court, said: "To take the case out of the statute by a part payment, such payment must be made at the time of the contract. This is the express language of the statute; and to show that such was the intention of the legislature it is only necessary to refer to the revisers' notes. The section as originally reported by the revisers provided that the goods, etc., should be accepted and received at the time. The words *at the time* were stricken out by the legislature. The words requiring the payment of some part of the purchase-money at the time of the contract were in the original report of the section, and were retained by the legislature. The provisions of the statute on the subject, which were in force at the time the revised statutes took effect, n declared the contract 'not good, except the buyer shall accept and actually receive part of the goods sold, or give something in earnest to bind the bargain or in part payment,' or that the contract be in writing, etc. Nothing is there said as to the time when the goods, etc., must be received or the earnest-money paid. The section of the Revised Statutes as reported by the revisers required both to be done at the time of the contract. The legislature struck out the provision as to the time of accepting a part of the goods, etc., and enacted it as to the time when the earnest-money should be paid. There is, I think, no ground for misunderstanding the force or meaning of the section in question as enacted. The case of Thompson *v.* Alger, 12 Met. 428, is referred to by the plaintiff's counsel as holding that the part payment, under our statute, may be made after the time of the contract. The judge who delivered the opinion of the court in that case certainly did advance such a proposition. But it was not necessary to the decision of the case, and no such decision was in fact made. The payments claimed were made after the negotiation for the purchase of the railroad stock had commenced, but before the agreement was finally concluded, and it was upon that ground that the court held the contract valid. But if otherwise — if the court had decided that payment after the contract was concluded, and upon a subsequent day, would have been sufficient to have relieved the case from the operation of the statute — I should not feel bound to follow it, notwithstanding my great respect for the distinguished and learned tribunal which made the decision. It seems to me that any other view of the question than the one I have represented would amount to a repeal of the statute, or, at least, completely nullify the words 'at the time' in the third sub-division of the section referred to."

[2] 12 Met. 428.

[3] 39 N. Y. 276.

and more tenable ground, not that the words "at the time" in the statute have no meaning, or can be disregarded; but, that, where both parties to the previous negotiations make a distinct, intelligent reference to them, — both of the parties recognising the want of binding force or validity to such negotiations, because no part of the stipulated price has been paid, — and, there is, as there was in Bissell *v.* Balcom, a declared intent to make the bargain valid and binding, assented to, a request for the payment of the money for that purpose, and a payment in compliance with that request, — such a payment is a payment of part of the price at the time of the agreement, within the only reasonable meaning and intent of the statute. The court, however, while repudiating the idea that every payment on account of a previous oral agreement for a sale operates *per se*, and necessarily, as a reiteration and affirmance of that oral agreement, do present what they call "a plausible argument" in favor of the view that after parties have made an agreement complete and operative, in all respects but for the statute, and, at some subsequent period, no matter how remote, the one offers payment on that contract, the mere act of offering payment, without anything further on his part, is an offer to enter into the relation and obligation which the terms of the previous oral agreement are apt to create, and of part performance of its duties; and, if the other accept the payment on the contract, his act is a then present declaration or affirmance of his assent to the conditions of the agreement, and an acceptance of its performance.

This view — which was not relied upon in the actual decision of the case — would go, in effect, the full length of holding, that which the court declare they have no intention of holding, — that any payment on account of a previous oral agreement for a sale operates *per se*, and necessarily, as a reiteration and affirmance of that oral agreement; that payment *at any time*, accepted on account of the oral contract, is to be deemed a reproduction of all the terms and conditions of the contract in the minds of the parties, a meeting of those minds in a present mutual assent, and a compliance with the statute by payment and acceptance of part of the price; that the mere fact of payment creates a present, and not merely a past, agreement of sale, and payment, in the language of the statute, "at the time" of part of the price. The argument for such a conclusion seems to us neither plausible nor sound. If the language in the statute means anything, we think it means that the payment, to take the case out of the statute, so that the oral contract may be enforced, must be made, as we think is unquestionably implied, "at the time" of the making of the

contract: that the statute has respect to the time of the making of the oral contract, at which time the money must be paid, and not to the very converse of this, — the part-payment of the money *at some other time* than that of the making of the contract, in order to render valid an oral contract declared invalid because "at the time" of its having been made, there had been no part payment of the consideration money.

This view, of course, to satisfy the requirements of the statute, would not prevent the parties who had made a verbal contract, invalid because those requirements were not complied with, from making a new contract which would not be open to such an objection; nor, when the parties had been negotiating, but had not concluded the terms of the contract, could there be said to be, *dehors* the statute, a contract made until the terms were finally agreed upon, to which "the time" of part-payment in the contract would have relation. But, as an illustration, we think if parties made an oral contract of sale, defective because of non-compliance with the provisions of the statute, the statute would not be complied with, by the vendee, six months later, simply enclosing to the vendor a sum of money on account of the oral contract made between them six months before. And we think that the mere retention of such money by the vendor would not render valid the previous invalid contract, so as to enable either the vendor or the vendee to enforce the oral contract, on the ground that there had been a sufficient part-payment "at the time" of the making of the contract to satisfy the statute.

As far as the reasoning in Bissell *v.* Balcom [1] called "plausible" controverts this view, we think neither it, any more than the view of the Massachusetts Court in Thompson *v.* Alger,[2] can be fairly sustained; and that, if those views were judicially sustained, the third clause in the New York statute would be judicially repealed.[3] We think, also, that the view of the New York Court of Appeals,[4] in support of their "plausible" argument, that when the payment has not been made "at the time" of the making of the contract, the oral contract may be deemed void for some purposes and not for others, is also untenable, and is unwarranted by the statute,

[1] 39 N. Y. 275, at pp. 283, 284.

[2] 12 Met. 428.

[3] That clause, in effect, is that every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, *shall be void*, unless the buyer shall at the time (*i. e.*, "at the time" of the making of the contract) pay some part of the purchase-money. The evidence, then, required to prevent such a contract from being void is that *at the time of its making* part of the purchase-money was paid. It assumes that there may be such contracts that shall be void, and that such void contracts shall not be made good by a part payment of the purchase-money, unless such payment shall have been made at the time of the making of the contract. *Ergo*, that there may be a part payment of the purchase-money, not made at the time of the making of the contract, which will not render such *void* contract good.

[4] At p. 283.

which, in letter or in spirit, makes no such discrimination as is made in the "plausible" argument of the court.[1]

In a case in the Supreme Court of New York,[2] decided concurrently with Bissell *v.* Balcom,[3] in the Court of Appeals, it was expressly decided, absolutely in terms, that "the *subsequent* payment of the money is a . . . compliance with the statute which requires it to be paid *at the time*."[4] On the face of this proposition the contradiction is so apparent as to stamp it with its own refutation.[5]

[1] But, after having indulged in their *plausible* argument, the court really place no reliance on it, but decide the case on safer grounds. They say: "The present case, however, does not require that this construction of the statute should be affirmed in order to sustain the verdict of the jury. It cannot be denied that, although the parties had not, in the first instance, made a valid agreement, they had a right, and were fully competent to make one. If they were satisfied with the terms to which they had before assented, it was wholly unnecessary that they should change them in any particular. It was surely enough that, with avowed consciousness that they were not bound, they should mutually agree to a sale, and, for the purpose of giving it complete legal validity, do just what they believed to be, and what the statute declares to be, indispensable. All this was done in the present case. Both actually indicated their knowledge that the bargain theretofore lying in words did not bind them. They both, in terms, referred to that bargain as a transaction, the import of which was in their minds. The clear intent and purpose now to enter into such transaction as should bind each according to the terms before assented to, was expressed. For that purpose money was asked, and for that purpose money was paid. Could this transaction have borne any other character, or been any more intelligible, or of any greater legal effect, if the plaintiff on that occasion had, in words, said to the other: 'We yesterday agreed, I to sell, and you to buy, my fifteen head of cattle, then in our view feeding on the plains,' etc., recapitulating the precise bargain. 'We are both aware that that agreement bound neither of us, because no part of the price was paid. I propose to sell the cattle to you upon these terms, and that you should pay me a part of the price,' to which the defendant replied: 'I assent,' and thereupon makes payment. No sensible distinction can be pointed out between such a transaction and that in which the parties did engage, with expressed consciousness that the former treaty did not bind them, and with expressed intent to become bound to the purchase and sale. When the parties met on the day last referred to it may be assumed that, although the parties had each assented to the sale, there was no binding agreement, because the statute was not complied with. They desired and intended to make a valid sale. Either of these things might be done: *First*, an agreement might be reduced to writing in the terms of the previous oral treaty; or, *second*, actual delivery of one or more of the cattle might be made and accepted; or, *third*, the parties might manifest their assent to a sale upon those terms, and pay part of the price. This is not doubtful, and in either case the sale would be binding. Who shall prescribe the precise form of words in which such mutual assent to the sale shall then be declared? That form is not of the substance of the matter. It is enough that the language and acts of the parties clearly express it, and it may be done as well by reference to it, as then present in the mind and memory of both, as by the idle form of recital or repetition."

[2] Webster *v.* Zielly, 52 Barb. 482.

[3] 39 N. Y. 275.

[4] The italics are theirs.

[5] The following is the portion of the judgment of the Supreme Court (Potter, J., delivering the judgment) relating to the point: "The main point of defence upon which reliance was made, was that, assuming the agreement to be a contract for the sale of personal property exceeding $50 in value, and there being, as conceded, neither a memorandum in writing nor a delivery of any part of the property, no part of the purchase-money was paid down at the time of making the contract. The $50 that was to have been paid by the terms of the oral agreement was not paid at the time the parties first entered into the contract; but a few days afterward the defendant's agent called upon the plaintiffs and then paid it, and it was accepted by the plaintiffs. Upon the authority of the case of Bissell *v.* Balcom, 40 Barb. 98, this would bring the case within the statute of frauds. By that case *the subsequent payment of the money is not a compliance with the statute, which requires it to be paid at the time.*

Fortunately there are later, better, and more authoritative decisions on the subject than Webster *v.* Zielly.[1] In Walrath *v.* Ingles,[2] an oral contract was made for the sale of clover-seed, exceeding $50 in value, no part of which was delivered. The payment for the clover-seed was to be in sugar, no part of which was delivered at the time of the making of the contract for the sale of the sugar. The court held that a subsequent delivery of the sugar would not take the case out of the statute. Under the contract it was agreed that the sugar which was to be given

[This is the proposition they undertake to refute.] With all my respect for the authority of that case, and for the opinion of the distinguished justices who adopted that opinion, I am not able to concur in its soundness. It is contended that without that construction the words *at the time* in the statute are useless, and that a different construction would repeal the statute or nullify those words. Such is not my view. Statutes are always to be sensibly construed. It is doubtless that these mere *words* of agreement in such a contract to purchase would be a void agreement, and would, doubtless, continue to be a void agreement until some act should be done to make it binding. But where parties have thus agreed by *words*, where their minds have met and concurred as to the terms, while their minds and wishes still continue, and while they still desire it to be a legal agreement, may they not do an act that shall effectuate that desire? It would be strange, indeed, if two parties who had made a contract void under the statute of frauds had not the power afterwards to meet, and by such an act as the statute requires validate and make effectual that which before was a void or imperfect contract, when the minds of both concur in making it valid. What is the subsequent meeting of the parties for this purpose but a repetition of their former void agreement between themselves, and then adding such other act as will bring it within the requirements of the statute? Can they not make a *valid* contract on the latter day, when both parties intend to do so, merely because they had previously made an invalid one? I think they can. What the defendant calls the *time* of making the agreement may just as well be regarded as an open proposition existing between them, until the subsequent validation of it by an act of earnest, *as by payment of money or reducing the agreement to writing.* [Here the fallacy in the reasoning of the court in their construction of the statute is transparent. The statute allows the contract to be proved *by the subsequent note or memorandum in writing*, but *not* by a subsequent part-payment of the money. If the language in the New York statute were the same as in the English statute of frauds, the reasoning here would be sound; but as the language is, in effect, just the reverse, the reasoning is fallacious.] After such an act has been performed, then the words of the statute, 'at the time,' refer to the time of the last act of the parties to consummate the agreement. [This is inaccurate. The 'time' referred to is that of the making of the oral contract, *at which time*, to make the contract valid, the part-payment must be made. The effect of a part payment being made at any time subsequent to the making of the oral contract is not to make the 'void' contract valid. As regards the part payment, the oral contract is, under the statute, to be 'void,' if such part payment is not made at the time of the making of the oral contract.] If this last act, which makes the contract legal, should never happen to be performed, then the words, 'at the time,' must necessarily refer to the time when *the void agreement* [the italics here are ours] was made. At the time this money was paid there was a concurrence of minds, on the one part to bind the agreement that *had been made in words only* [and, therefore, under the statute was declared 'void'], and on the other part to receive it as the consummation of that agreement. [That is, of that *void* agreement.] I do not hesitate to say that such an act of paying money under such circumstances brings the case within the spirit and intent of the statute of paying a part of the purchase-money at the time. It is the time that the parties consummated the agreement, as both understood and intended. This is the view taken by a distinguished judge in Massachusetts (Thompson *v.* Alger, 12 Met. 435) and one equally distinguished in this State, in McKnight *v.* Dunlop, 1 Seld. 543, cited it with approbation."

[1] 52 Barb. 482.

[2] 64 Barb. 265.

in part payment for the clover-seed was to be taken away on the following day, on the delivery of the clover-seed. The action was for non-delivery of the clover-seed; it being claimed that the agreement with reference to the sugar constituted a part payment of the price of the clover-seed. The jury having found for the plaintiff, the decision was reversed, the court saying: "To constitute a payment as earnest, or a part payment, within the meaning of the Statute of Frauds, there must be an actual transfer or delivery of the thing, or the money agreed to be given as earnest or part payment. The statute requires it to be paid *at the time* of the contract. How then can a delivery of the thing afterwards, without acceptance, operate to take the principal contract out of the Statute of Frauds? To allow the parties to agree, by parol, upon a mode of payment to be completed afterwards, would let in the very mischief which the statute intended to avoid."

In Allis *v.* Read,[1] in an action for the return of moneys paid on a contract of sale originally void by the Statute of Frauds, the court held that the subsequent acts and declarations of the parties between them at the time of the payment of the money may constitute a binding contract between the parties as from that date. After fully stating the facts, showing what took place between the parties at the time of the part payment, the court say, "*The terms and conditions were fully understood and agreed upon.* All the evils which the statute intended to prevent were guarded against. The acts of the parties were numerous, open, and unmistakable. It is unnecessary to determine that every void contract may be made valid by a payment subsequent to the time of making; but I do not hesitate to say that after a void contract has been made, the parties may make a valid contract, by adopting the terms of the void contract, provided it appears that such terms are understood and assented to, and a payment is made and received upon the contract. It is a valid contract from that time, and the statute is as fully satisfied as if the contract had been made valid originally by a payment at that time." We think the law, within these limits, is correctly laid down in this case.

The later New York cases have placed the law in the matter on what we think is a perfectly sound basis. In Hunter *v.* Wetsell[2] an action was brought to recover the price of hops. The contract for their sale was made in September, orally. The plaintiff relied on payments made in November, of $200, and $100 in December following, to take the case out of the Statute of Frauds. There was no proof of anything having been said about the hops or the contract when these payments were made.

[1] 45 Barb. 142.

[2] 57 N. Y. 375.

The evidence simply was that the payments were made toward the hops, and did not show that the contract was mentioned or referred to. The court held that the contract was void. The court held the following points as established: 1. Where a contract of sale has been made, good at common law, but void under the Statute of Frauds, and the parties subsequently meet, and for the express purpose of then complying with the statute and making the contract valid, a payment is made by the purchaser upon the contract, at the request of the seller, such payment is made at the time of making the contract, within the meaning of the statute. 2. Where, in case of such a void contract, the parties subsequently come together, and substantially restate, reaffirm, or renew its terms, so as then and there, by the meeting of their minds, to make a contract, and then payment is made upon the contract, the statute is complied with.[1]

In a subsequent case between the same parties,[2] another question arose. It appeared, by the evidence on the second trial, that at the time of the payment of the $200, there was a restatement of the essential terms of the contract, so as to bring the case within the principles laid down by the court in the prior case,[3]

[1] The court, in deciding the case, deal thus clearly and intelligently with the whole question: "The English statute of frauds did not require the payment, to render a contract for the sale of goods valid, to be made *at the time* of making the contract, neither did the statute of this State in force prior to the Revised Statutes. (1 R. S. 80, § 15.) The revisers, in their report to the legislature, provided that the memorandum, the delivery, and the payment, should be made *at the time* the contract was made. But the legislature modified the provision as reported, and adopted it as we now find it in the statutes. The revisers deemed it important that the conditions prescribed to render the contract of sale valid, should be complied with at the time of making the contract. This was an alteration of the law as it had before, for more than a century, existed in this State and in England, and the attention of the legislature was thus distinctly called to it. It omitted the requirement as to *time*, so far as related to the memorandum and part delivery, but retained it as to part payment. Effect must be given to this language. A contract for the sale of personal property for the price of fifty dollars or more, is declared void unless one of three things be done, the last of which is payment by the buyer, *at the time*, of part of the purchase-money. *Payment afterward will not do. The payment must be made when the contract is made.* Such is the plain language of the statute. Here there was but one contract made, which was in September. There was no attempt to make any other. There was no talk about any, and so far as appears, no renewal, reaffirmation, or restatement in any form of that one. All that took place afterward was a payment of $300 towards the hops. If this could be called a payment at the time of making the contract, within the meaning of the statute, then this provision of the statute serves no purpose, as every payment subsequently made, to apply upon the contract, would render it binding within the statute, and the provision requiring payment at the time would be nullified. *A payment not made at the time can never, under any circumstances, satisfy the requirement of the statute.* But when a contract for the sale of personal property, valid at common law, is made, and the buyer afterward pays expressly to bind the contract, or, when payment is made, the parties then reaffirm or restate the terms of the contract, and their minds then meet so as to make a contract, the statute is undoubtedly satisfied. Such a payment is made at the time of the contract, and not afterward." We think this is an admirable exposition of the law under this class of statutes.

[2] Hunter *v.* Wetsell, 84 N. Y. 549, 2d case.

[3] Hunter *v.* Wetsell, 57 N. Y. 375, 1st case.

and on that ground to make the contract valid under the statute. But the payment having been by check, the money for which might or might not be received at substantially the time of the contract, it was claimed that that did not constitute a payment at the time of the making of the contract, within the meaning of the statute. But the court held that it did. This holding accords with the English decisions on analogous questions,[1] and the reasoning of the New York court is to the same effect as in the English cases.[2]

The late case of Jackson *v.* Tupper[3] affirms the doctrine that under the New York statute payment operates to take an oral contract for the sale of goods for the price of $50 or more out of the statute only when it is made at the time of the contract; that payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior oral agreement valid. There must be enough in addition to the act of payment, where this is not made strictly at the time of the oral contract, to show that the terms of the prior oral contract

[1] See *supra*, p. 275, n. 2.

[2] Finch, J., in delivering the judgment of the majority of the New York Court of Appeals, says: "But it is now objected that, conceding the fact of such restatement, there was no payment of any part of the purchase-money at that time. It is admitted that the check was then given, and it cannot be successfully denied that it was both delivered and received as a payment upon the contract price of the hops; but it is claimed that the check was not, in and of itself, payment, and having been drawn upon a bank, could not have been in fact paid until afterward, and so there was no payment 'at the time' to satisfy the requirements of the statute. It is quite true that a check, in and of itself, is not payment, but it may become so when accepted as such, and in due course actually paid. While not money, it is a thing of value, and is money's worth when drawn against an existing deposit which remains until the check is presented. We must assume that the check of the vendee, in this case, was good when drawn, and was duly paid upon presentation in the usual and regular way, for it appears in the possession of the drawers, and they practically assert the fact of its payment by their counter-claim in the action, by which they seek to recover back the money so paid. There was, therefore, an actual and real payment made by the vendees to the vendor, upon the purchase-price of the hops. It is said, however, that the actual payment of the money, as distinguished from the delivery of the check, was not 'at the time' of the contract, but at some later period. We do not know accurately when the check was paid. It may have been the same day. It may have been within a very few moments. It may not have been till the next day. We are not to presume, for the purpose of making the contract invalid, that it was held beyond the natural and ordinary time. In such event, it is a very narrow construction to say that the payment was not made at the time of the contract. The purpose and object of the statute should not be forgotten. Its aim is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory or downright perjury. Indeed, it would be an entirely reasonable and just construction to say that the delivery of the check and its presentment and payment, constituted one continuous transaction, and should be taken as such without reference to the ordinary delay attendant upon turning the check into money. The statute does not mean rigorously, *eo instanti*. It does contemplate that the contract and the payment shall be at the same time, in the sense that they constitute parts of one and the same continuous transaction. We think, therefore, there was a payment 'at the time' within the meaning of the statute, and that the contract of sale was valid." Artcher *v.* Zeh, 5 Hill, 200; Hawley *v.* Keeler, 53 N. Y. 114; Bissell *v.* Balcom, 39 N. Y. 275.

[3] 101 N. Y. 515.

were then in the minds of the parties, and were reaffirmed by them; and this being shown, a cause of action arises, not on the prior oral contract, but on the new contract made at the time of payment. So, after much fluctuation, the law is now firmly established on a sound and intelligent basis.[1]

The Wisconsin Statute of Frauds[2] is to the same effect as that of New York, and the same construction is placed upon that statute as is now the settled law in New York. In Bates *v.* Chesebro[3] a verbal contract was made in September, for the sale of broom-corn to the amount of $1200 to $1400. Evidence was given to show a payment by the vendee, in December following, of $47 on account of the contract. On the trial the court charged that if the verbal agreement were still existing at the time of the payment of the $47, and the vendee paid and the vendor received the sum as part of the purchase-money, the contract was rendered valid. The Supreme Court held that this was a misdirection; that the statute makes it essential that the earnest-money must be paid at the time the contract was made, and that part payment made at some subsequent time, without anything further, will not validate the contract. The law is laid down in substantially the same way as in the latest and well-decided New York cases, the reasoning in which is approved and adopted.[4]

Bates *v.* Chesebro, above stated, came up again,[5] when evidence of a conversation between the parties at the time of the payment of the $47, on the 14th December, was relied on as a sufficient restatement of the contract to make the part payment then a payment "at the time" of the making of the contract. The Wisconsin Supreme Court, with a more rigid construction of the statute than that of the New York Court of Appeals, under a very similar state of facts, in Bissell *v.* Balcom,[6] held that if a valid contract is made at all, it must be made at the time the money is paid and received; as the payment of some earnest-money *then* is an essential requisite of the contract. Hence that a void contract cannot be rendered valid simply by the subsequent part payment; that when such a payment is relied on, it must appear that the parties understood and agreed upon the terms of the contract at the time of payment, so as to make the payment apply on a present contract, and not upon some past

[1] See Allen *v.* Aquine, 5 N. Y. Leg. Obs. 380.

[2] R. S. c. 107, § 3.

[3] 32 Wis. 594.

[4] Bates *v.* Chesebro, 32 Wis. 594, was affirmed in Paine *v.* Fulton, 34 Wis. 83, the head-note of which latter case is: "Where the vendee, at the time of the sale, and as a part of the purchase-price of the goods, agrees to pay, and does afterwards pay, a debt of the vendor, this does not take the sale out of the statute."

[5] Bates *v.* Chesebro, 36 Wis. 636, 2d case.

[6] 39 N. Y. 275.

void agreement. The court also held that although the jury found that the parties knew and fully understood, when the $47 was paid in December, that the previous parol arrangement for the sale of the broom-corn was not binding, and that the money was then paid and received for the purpose of making that arrangement valid and obligatory at law, the establishment of these facts would be insufficient to make a valid contract.

But though, on very much the same state of facts, there is an apparent difference between the holding of the Supreme Court of Wisconsin in Bates *v.* Chesebro[1] and that of the New York Court of Appeals in Bissel *v.* Balcom,[2] they are reconcilable on the ground that in both of them the question really was whether or not at the time of the payment there was such a meeting of the minds of the parties with respect to the contract as to make it a new contract at that time, even though all the terms of the contract were not verbally recited.[3] And in the Wisconsin case, after holding as we have stated, the court continue: "Because it was essential that the minds of the parties should then meet as to the terms and conditions of a contract, so as to form and make one. True, this might be done by referring to the previous oral agreement, and by adopting and assenting to that agreement as the new contract. If the minds of the parties met and assented to the terms and conditions of the prior agreement, then the statute would be satisfied, because a complete contract would be entered into at the time part of the purchase-price was paid. And the real question therefore was, did the parties, on the 14th of December, make a new contract by referring to, adopting, and confirming the terms of the previous void agreement? Did their minds meet upon the subject of the contract of sale, and was the $47 paid upon this new contract? If so, there was a valid contract entered into which can be enforced; otherwise there was not."

And this is substantially the ground upon which Bissel *v.* Balcom[4] and the later New York cases were decided, although there are some references in some of these to Bissel *v.* Balcom[5] which, as isolated expressions, would rather imply an antagonism between Bissel *v.* Balcom[6] and Bates *v.* Chesebro[7] which does not really exist.

The decisions in Bates *v.* Chesebro[8] were acted on in Pike *v.* Vaughn,[9] where there was a contract for the sale of logs in the

[1] 36 Wis. 636, 2d case.
[2] 39 N. Y. 275.
[3] See Bissell *v.* Balcom, 39 N. Y. at pp. 285, 286.
[4] 39 N. Y. 275.
[5] *Ibid.*
[6] *Ibid.*
[7] 36 Wis. 636.
[8] 32 Wis. 594; 36 Wis. 636.
[9] 39 Wis. 499.

fall of 1873, on which, from that time down to March, 1874, goods, provisions, and supplies were furnished to the amount of $1300 or $1400, and from that time down to August, 1874, over $1700 additional was paid in money and goods, on account of the logs.[1]

Hanson *v.* Roter[2] is another case in which it was decided that a payment made on account of an oral contract, invalid by the Statute of Frauds, would not render the contract valid, the payment not having been made at the time of the making of the contract. Prior to the decision of this case (A. D. 1885), an act "relative to the sale of personal property" was enacted by the Wisconsin legislature, which in terms provides that "No contract for the purchase, sale, transfer, or delivery of personal property to be delivered and paid for at a future day or period, shall be void when either the buyer or seller shall in good faith intend to perform the contract." The act declares that "Any act or part of an act conflicting with this act is hereby repealed."[3] It was claimed in Hanson *v.* Roter[4] that this act repealed the Wisconsin Statute of Frauds; and this was rather acceded to by the court, which held, however, that the act of 1883 did not affect Hanson *v.* Roter, because the contract in that case was made before the act of 1883 was enacted.

In the later case (A. D. 1887) of Kerkhof *v.* The Atlas Paper Co.,[5] where it was again held that a subsequent payment on account of a parol contract, void under the Statute of Frauds, did not render the contract valid, it was claimed that the act of 1883 had repealed the Statute of Frauds. The court were of the opinion that it was never intended by the legislature to have any such sweeping effect. They also took the position, as the act excluded "extrinsic evidence that such contract had any other intent or meaning than *expressed or stipulated* thereby," that this showed that the act was intended only to apply to written contracts. But we think that the intent or meaning of a contract may be as well "*expressed or stipulated*," where the contract is oral as where it is written. We can see, on this ground, no intelligent distinction.[6]

[1] And see Mason *v.* The H. Witbeck Company, 35 Wis. 164; Bacon *v.* Eccles, 43 Wis. 227.

[2] 64 Wis. 622.

[3] Laws of Wisconsin for 1883, p. 65 c. 81, §§ 1, 2.

[4] 64 Wis. 622.

[5] 68 Wis. 674.

[6] The court also say that the act was passed to obviate the decisions in Barnard *v.* Backhaus, 52 Wis. 593, and Everingham *v.* Meighan, 55 Wis. 354, which were decisions on gaming contracts. As the contract in this latter case was, apparently, merely oral, if the act was intended to apply only to written contracts, the intention to obviate the decision in Everingham *v.* Meighan, 55 Wis. 354, seems not to have been effectually accomplished. We think that the act, on its very face, renders valid *all contracts* for the purchase, sale, transfer, or delivery of personal prop-

In Gault *v.* Brown,[1] an oral contract for the sale and delivery of wood of the value of upwards of $33, to be paid for as delivered, invalid when made, was held to be an entire contract, and the payment for part of the wood on its receipt took the case out of the statute as to the undelivered part.[2]

In Bigg *v.* Whisking[3] it was held, that whether a transaction amounts to one entire contract or to several, so that any part payment or delivery may satisfy the Statute of Frauds as to the whole, depends upon the circumstances of each case; and it is not necessarily conclusive because the transaction takes place at the same time and place, or at different times and places. If the result of various bargains at different times and places, but in the course of the same transaction, be reduced into writing, and signed by one party in the presence of the other, and the memorandum is given to, though not signed by him, that is evidence that the contract was joint and entire; although, as against the party who did not sign it, it may not be *per se* binding under the statute, it may be made so by part-payment or part-delivery of any of the goods comprised within it, and then the written

erty to be delivered and paid for at a future day, when either the buyer or seller shall in good faith intend to perform the contract; and that all such contracts "and all collateral contracts, agreements, or securities growing out thereof, or of which they may have formed the consideration in whole or in part," are to be "deemed legal and valid to all intents and purposes;" the act to apply to all cases except only where they are vitiated by fraud, or where the contract is without sufficient consideration, or where both the parties to the contract intended to make a wagering contract. And as all acts or parts of acts conflicting with this act were repealed, and as the Wisconsin statute of frauds does interfere with this act, plainly and radically, we think it was expressly repealed. The language of the act, we think, is too clear to admit of any question as to its meaning. And as Lord Denman said in Rickman *v.* Carstairs, 5 B. & Ad. 663, "the question in this and other cases of construction of written instruments is, not what was the intention of the parties, *but what is the meaning of the words they have used.*" And when this, on the face of a statute, as on the face of a will, deed, or other instrument, is as clearly expressed as it seems to us to be in the Wisconsin act of 1883, we think the principle laid down in Dwarris on Statutes, p. 557, applies, and that "courts are bound to give it effect, whatever may be their opinion of its wisdom or policy." The mere act of inserting in the statutes of New York, Wisconsin, and some of the other States, the words "at the time," with reference to the payment of earnest to take the case out of the statute, has, as we have seen, introduced a new element of confusion in those States, in connection with the law of sales. With the difficulty staring them in the face which the absolute sweeping away of that statute would produce, we are not surprised that the Supreme Court of Wisconsin sought for some construction of the Wisconsin act of 1883, which would have a less "sweeping effect" than that which involved the total repeal of the statute of frauds in that State. But whatever may have been their opinion of its "wisdom or policy," we think the proper construction of the act of 1883 is, as was contended and in effect admitted in Hanson *v.* Roter, 64 Wis. 622, 625, to render valid all *bonâ fide* contracts "for the purchase, sale, transfer, or delivery of personal property to be delivered and paid for at a future day or period," in Wisconsin, since the coming into force of that act; and that their statute of frauds and all other acts or parts of acts conflicting with the act of 1883 were repealed.

[1] 48 N. H. 183.

[2] See Baldy *v.* Parker, 2 B. & C. 37; Elliott *v.* Thomas, 3 M. & W. 170; Gilman *v.* Hill, 36 N. H. 311.

[3] 14 C. B. 195.

memorandum is evidence of the contract against him. Thus, in an action for the price of timber bargained and sold, it appeared that the defendant had proposed to meet the plaintiff to purchase timber; and, having met him, had gone with him to several places, some miles apart, but all on the same day, purchasing lots of timber at each place, at separate prices, — the amount in each case being above £10, — and that then the plaintiff had, at the defendant's proposal, made a memorandum of these bargains, signing it, and giving it to the defendant. Some of the timber had been delivered and received, and payments had been made generally on account. The defendant refused to receive the residue, and had made no payments on account of it; it not appearing from what particular lots the timber received or that refused had come. It was held that the contract was one and entire; and therefore that the statute was satisfied by payment or part-delivery of any of the timber.[1]

Fifty-two head of cattle were sold by the plaintiff to the defendant, — fifty at one price, and two at another; the two to be delivered the week succeeding the sale, and the fifty at different intervals thereafter. The two were delivered to the defendants, who refused to receive the remainder. The court held that although the contract at the time it was made was void under the Statute of Frauds, still it was good as a proposition of price, and a subsequent delivery and acceptance of two of the cattle (and a part payment of the price would have had the same effect) one week after the contract was made, without any change of its terms, and under the proposition or offer, made it binding, and took the case from under the operation of the statute.[2]

But there must be an actual payment, no matter what the subject of the payment may be, — whether money or money's worth. If the part payment is in other goods, there must be a delivery of the goods; if a debt or claim by the vendee against the vendor, there must be an actual extinguishment of the debt or claim. The matter must not be left *in fieri*.[3]

[1] Bigg *v.* Whisking, 14 C. B. 195.

[2] Rickey *v.* Tenbroeck, 63 Mo. 563. In Sprague *v.* Blake, 20 Wend. 63, Cowan, J., said: "The part delivery need not be at the time of the contract. An oral agreement may stand for a mutual agreed proposition, and unless revoked, the subsequent acceptance of part of the goods which were the subject of oral negotiation will make it binding." And see Hart *v.* Sattley, 3 Camp. 528; Jennings *v.* Wheeler, 7 Cow. 256, 262; 8 Wend. 397, 400; Marsh *v.* Hyde, 3 Gray, 331; McKnight *v.* Dunlap, 1 Seld. 137; Scott *v.* Eastern Counties Ry. Co., 12 M. & W. 33; Cuff *v.* Penn, 1 M. & S. 21; Boutwell *v.* O'Keefe, 32 Barb. 434; Stone *v.* Rogers, 2 M. & W. 443; Lovelock *v.* Franklyn, 8 Q. B. 371; Davis *v.* Eastman, 1 Allen, 422; Chaplin *v.* Rogers, 1 East, 192; Carter *v.* Touissaint, 5 B. & Ald. 855; Vincent *v.* Germand, 11 Johns. 283; Sprague *v.* Blake, 20 Wend. 61; Davis *v.* Moore, 13 Me. 424.

[3] See *ante*, p. 275, note 2.

Where there is an agreement to take goods in part payment, when they are taken on that agreement they are part payment whether under the Statute of Limitations or the Statute of Frauds.[1] In Williams *v.* Griffiths,[2] to take the case out of the Statute of Limitations, it was held that there must be a part payment in cash, or what is equivalent to it, to have that effect. An agreement that one claim should go against another, without anything further in the way of the cancellation of the respective claims, will not do.[3]

In Hooper *v.* Stephens,[4] where a bottle of gin was delivered and accepted as a payment on a previous debt, the court held that where anything is received, upon agreement, in reduction of a debt, that is payment.

Where a purchase of personal property is made by A. from B., A. agreeing to pay C. a debt due him by B., and does so, this is a good payment under the statute to bind the bargain, the promise thus having become one to pay A.'s own debt, and is not void as the promise to pay the debt of another.[5] But as the statute requires that the purchaser shall pay some part of the purchase-money, a mere promise to pay a debt of the vendee is not sufficient.[6]

And where the vendee is indebted to the vendor on a prior transaction, where a purchase was made, the price to be paid by crediting the amount of the vendor's indebtedness, and no act was done to carry it out, this is no payment. There must be an actual application made of the prior indebtedness by a receipt, or by crediting it in some manner.[7]

Where A. was indebted to B. on a mortgage of horses for $500, and B. bought the horses for $300, which amount was to be credited on the mortgage, but this was not in fact done, it was held that this was no payment of the purchase-money of the horses within the statute.[8]

In Brabin *v.* Hyde[9] the defendant purchased a horse for $175 from A., who, at the time, was indebted to the defendant in a

[1] See Hart *v.* Nash, 1 C. M. & R. 337.
[2] 1 C. M. & R. 45.
[3] *Ibid.*
[4] 4 A. & E. 71.
[5] Cotterill *v.* Stevens, 10 Wis. 422. See Emerick *v.* Sanders, 1 Wis. 77; Barker *v.* Bucklin, 2 Den. 45; Farley *v.* Cleveland, 4 Cow. 432; Arnold *v.* Lyman, 17 Mass. 400; Cabet *v.* Harkins, 3 Pick. 91; Crocker *v.* Higgins, 7 Conn. 341.
[6] Artcher *v.* Zeh, 5 Hill, 200. Here the court said that no doubt the statute must be taken, in its spirit, to mean anything or part of anything given, by way of consideration, which is money or money's worth. But the object of the statute was to have something pass between the parties besides mere words; some symbol, like earnest-money. But where there is simply an agreement, which has not been acted on by an execution of the promise, everything lying in parol, the statute is not satisfied. *Ibid.*
[7] Clark *v.* Tucker, 2 Sandf. 157; Shindler *v.* Houston, 1 Comst. 261.
[8] Ely *v.* Ormsby, 12 Barb. 570.
[9] 30 Barb. 265.

larger sum than $175. It was agreed between them that the $175 should be credited to A. in defendant's books. The defendant then went to his own residence, which was about a mile from where he had made the purchase, and immediately credited the $175 on his books. The court below held that the contract was void by the New York Statute of Frauds.[1]

In Mattice *v.* Allen,[2] where the parties were negotiating a sale of barley, and, before consummating the sale, the plaintiff borrowed $40 from the defendant's agent, which it was then agreed between them should be applied upon the sale of the barley if they concluded a bargain therefor. A few days afterwards they concluded such bargain, when it was agreed that the $40 should be applied on the contract. The New York Supreme Court here held, that this was a payment at the time, sufficient to take the

[1] But the Supreme Court of New York reversed this decision. Johnson, J., in delivering the judgment, said: "This was a complete execution and performance of the contract on the part of the defendant. The contract was by parol, and was not binding until the price agreed upon was paid. The statute declares such a contract void, unless the buyer shall accept and receive the goods, or some part thereof, or shall at the time pay some part of the purchase-money. Here the agreement and credit were obviously all one transaction. *The time* was continued until the credit was given, as the parties evidently contemplated that the defendant was to go where his books were kept, before entering the credit. It must be therefore regarded as a payment made at the time, within the meaning of the statute." On these premises we think the decision was correct, although it was subsequently reversed on appeal. But we think, while the following is a perfectly correct exposition of the law under the English statute, and similar statutes, it is not, as we have seen (see *ante*, p. 286 *et seq.*), correct as applicable to such statutes as those of New York, Wisconsin, and some of the other States, where the payment has to be made "at the time" of the making of the contract. Johnson, J., says further: "The moment payment is made, in pursuance of the agreement, the transaction is taken out of the statute, even if it was within it before. It may be true that as long as the agreement rested in mere words, the vendor might have put an end to it by rescission, or giving the defendant notice that he would not be bound or perform on his part. But having waited until the act of giving the credit agreed upon was performed, he was bound by the bargain, and could not thereafter treat it as a nullity. The cases of Artcher *v.* Zeh, 5 Hill, 200; Clark *v.* Tucker, 2 Sandf. 157; Ely *v.* Ormsby, 12 Barb. 570; and Walker *v.* Hussey, 16 M. & W. 301, hold that where goods are purchased, to be applied in payment of a precedent debt, by indorsement or credit, the payment is not made, within the contemplation of the statute of frauds, until the indorsement is actually made, or the credit given, or the goods are received in payment. But these cases all concede that when the agreement is consummated by the act of indorsement, or entry of the credit, according to the agreement, the transaction is no longer within the statute. As long as such transaction rests in mere words, it is void, but is valid the moment the act of giving the credit is performed by the buyer." Brabin *v.* Hyde, 30 Barb. 267, 268. We think this whole reasoning is opposed to the position of the court in this case, that an agreement to pay or to give a credit, which is only acted on at a subsequent period, is really a payment made "at the time" of the making of the contract. It is clearly not law, and is not sustained by the later cases. See *ante*, 286 *et seq.* The principle applicable to statutes like that of New York is precisely the same as that applicable to the provision in stamp acts requiring the act of stamping to be at the time of the making, accepting, etc., of the promissory note or bill of exchange; the subsequent stamping involving the penalty. There is nothing in either case to prevent the issuing a new bill or note, or the making of a new contract. But, in the absence of this, the non-stamping of the note or bill at the time of the making or accepting, causes the disabilities of the act to attach to it, as the non-payment on the contract of sale "at the time" of its making, renders the sale void.

[2] 33 Barb. 543.

case out of the statute. The plaintiff had $40 in hand of borrowed money payable on demand, which was expressly received as a contingent advance upon the barley, and was subsequently applied as part payment therefor upon the consummation of the sale. The court held this was received as payment on the contract, and was to be deemed in fact as a conclusive and definite payment thereon for all purposes.

We consider these two cases[1] both about as extreme cases as can be imagined; and, on the assumption of the court in the former case, that virtually (if not *eo instanti*, at the closing of the case) while the contract was pending, the credit was actually made in the vendor's account, on the vendee's books, we would be inclined to think that that case was well decided, on the same principle that an actual indorsement by the vendee on the vendor's promissory note, of which the vendee was the holder, would be a good payment. But both of these cases were reversed on appeal.

In Brabin *v.* Hyde[2] it appears, on appeal, that the vendee's entry of the credit was not in his day-book or ledger, or in any book that he kept for the purposes of his business, or in any account of his daily transactions, but upon the blank leaf of a book by itself inaccessible to the vendor, if not to all other persons, and the vendee never communicated this entry to the vendor or to any one else. The court held that this was not sufficient to establish the fact of a payment having been made by the vendee to the vendor, and was a very different case from that of an indorsement on a note which would operate effectually as an extinguishment of the note *pro tanto;* that, in effect, there should be at the time of the contract some act of payment of a conclusive character, not resting in agreement or in mere words.

So, in reversing Mattice *v.* Allen,[3] the Court of Appeals treated that case, like that of Brabin *v.* Hyde,[4] as a case of prior indebtedness, with a mere agreement to apply such indebtedness as a payment on the contract of sale, but resting merely in words unaccompanied by the necessary act to make it, in fact, constitute a payment.

These cases, of course, being on the question as to whether what was done in them amounted to a payment, are applicable to statutes whether they do or do not contain the words, "at the time," of the New York, Wisconsin, and some other State statutes. So, in Teed *v.* Teed,[5] there was an oral contract for the

[1] Brabin *v.* Hyde, 30 Barb. 267, 268, and Mattice *v.* Allen, 33 Barb. 543.
[2] 32 N. Y. 519.
[3] 3 Abb. App. Dec. 248; 3 Keyes, 492.
[4] 32 N. Y. 519.
[5] 44 Barb. 96.

purchase of butter of the value of over $100, and at the time the defendant was indebted to the plaintiff in the sum of $6.50, for a barrel of flour, which was charged in the plaintiff's account-book to the defendant. At the time the contract was made for the butter, it was agreed that the price of the flour should be a payment on account of the butter, and the plaintiff made a memorandum to that effect in his memorandum book. But the court held that this was not sufficient; the entry should have been made on his account-book, to constitute it a payment, so as to have cancelled the charge for the flour. That is, the act to be constituted a payment must act as an extinguishment of the debt.[1]

The seventeenth section of the English statute implies that, to bind a buyer of goods of £10 value, where there has been no delivery and no writing, he must have done two things; first, made a contract, and next, he must have given something as earnest, or in part payment or discharge of his liability. But where one of the terms of an oral bargain is for the seller to take something in part payment, and there is nothing further, that term alone is not equivalent to actual part payment.

In Walker *v.* Nussey[2] it was verbally agreed between the parties that a previous indebtedness of the vendor to the vendee should go as part payment to the vendor of a lot of leather purchased orally. The court held that the alleged part payment was part of the bargain itself, and could not be wrested into proof of an actual payment, without repealing the statute, and suffering a verbal contract for the sale of goods of £10 value to have effect, without the safeguards provided by law against fraud in such cases, as no receipt, at the time of the second transaction was given the vendor for his debt by the vendee, nor any other thing done by him, so that everything rested in verbal contract. But the part payment required by the statute, in order to make the contract for the sale of goods of the value of over $40 binding on the parties, does not require the actual passing of money from the vendee to the vendor. But it must be of value, — money's worth; and it must be agreed by both parties at the time that the value is then actually passed from the vendee to the vendor; that it is a then present payment. It is not enough for the parties to agree that it shall be applied as payment. That would be merely an agreement to pay. It must not rest in agreement. The payment must be actually made, and both parties must so understand it, — the vendee that he pays and the vendor that he receives the value,

[1] Brand *v.* Brand, 49 Barb. 346; Walrath *v.* Richie, 5 Lans. 362; Hicks *v.* Cleveland, 48 N. Y. 84; Matthiessen, &c. Co. *v.* McMahon's Adm'r, 38 N. J. L. 536, are to the same effect.

[2] 16 M. & W. 302.

and thus that the title to the value has passed from the vendee to the vendor. The statute only requires actual part payment. It does not require that such payment shall be shown by writing, — by an indorsement, a credit, or a receipt, or by the manual delivery of any article or property of value. It leaves the parties to prove payment by such proof as they may have; but it does require proof of payment, and not of a mere *agreement to pay* or to apply in payment.

Thus in Dow *v.* Worthen,[1] where A. bought apples from B., under a verbal agreement that the price of the apples should be a part payment on poultry which B. was negotiating to buy from A., if the sale of the poultry were consummated; and on the consummation of such sale, the price of the apples was agreed on at $75, which was then agreed upon and treated by both parties as a then present payment, which extinguished the debt for the apples, and turned it into a claim as for money paid on the contract for the poultry; the court held that the case was taken out of the statute. But in Gilman *v.* Hill,[2] where on the verbal sale of pelts for more than $50, the parties agreed that a prior indebtedness of the vendor to the vendee should be allowed towards the pelts, the court held that this was not an act done, a payment actually made, but simply an agreement that the sum should be allowed, — a matter resting in contract only; and that the case was within the statute; but that this agreement, with the accompanying facts, was evidence that the parties treated the sale as consummated by a delivery and acceptance of the pelts.

In Hughes *v.* Paramore,[3] one of two persons who had dealings together and were mutually indebted to one another, had supplied some bricks on the credit of the other in 1834, but no account had been delivered or made out on either side. In 1845 they signed in duplicate a memorandum, saying, "It is agreed that Mr. R. in his general account shall give credit to Dr. H. for £174, being for bricks delivered in 1834." The court held that this was nothing more than an agreement to take a particular item into account between the parties, and was insufficient to exclude the mutual debts from the operation of the Statute of Limitations; and if the £174 could be taken as a payment at all, it could only be taken as payment at the time it was entered in the account, and not at the time when the agreement was entered into.[4]

[1] 37 Vt. 108.
[2] 36 N. H. 311.
[3] 7 De G. M. & G. 229.
[4] In order to take a case out of the statute of limitations by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, and that it was made as a part payment of a greater debt. Tippets *v.* Heane, 1 C. M. & R. 252. See further as to part payments to take the case out of the statute of limitations, Wain-

A verbal agreement was made in Gadds *v.* Leeson [1] for the sale by A. to B. of a lot of land for $400; and, as B. was owing A. more than that sum, the purchase-money was to be allowed on the account. There was no receipt taken for the $400, nor was any credit given on the account. It was held that there was no payment, or part performance of any kind, to take the case out of the statute.

In Phillips *v.* The Ocmulgee Mills,[2] it was held that a note of the vendee, payable in cotton, given for cotton purchased orally, and dated back to the time of the purchase of the cotton, though given after the destruction of the cotton by fire, related back and became part of the contract, so as to take the case out of the statute.

The act of part performance, whether it is a part delivery of the goods or part payment of the purchase-money, must be mutual. In either case the assent of both parties to the act of part-performance is necessary. Delivery of the goods without acceptance is insufficient; and payment implies a receipt and acceptance of the money or consideration by the party to whom it is made. But payment may be made to the vendor's agent authorized to receive it, as well as to the principal; and when made to an agent, it is payment to the principal. This rule of law applies as well to contracts within the Statute of Frauds as to other contracts. Payment to an agent furnishes the same ground of security against false claims as if made directly to the principal. And the authority of the agent to receive the payment may be shown by any act on the principal's part recognizing it; or the subsequent ratification of the act of the assumed agent is equivalent to an original authority.[3]

In this case (Hawley *v.* Keeler), terms of a proposed contract for the purchase of cheese were agreed upon on November 1, 1868, but there was no present contract of sale; and whether such a contract should be made was to depend upon the election of the plaintiffs, on or before November 3, to take the cheese at the price named, and their depositing $1000 in a bank to the defendants' credit. The court held that the deposit having been made at the time when, by the agreement of the parties, the contract of sale

man *v.* Kynman, 1 Ex. 118; Hayden *v.* Williams, 7 Bing. 163; Ashby *v.* James, 11 M. & W. 542; Edmunds *v.* Goater, 15 Beav. 415; Hooper *v.* Stephens, 4 A. & E. 71; Worthington *v.* Grimsditch, 7 Q. B. 479; Catling *v.* Skoulding, 6 T. R. 189; Tanner *v.* Smart, 6 B. & C. 603; Smith *v.* Thorne, 21 L. J. Q. B. 199; Gardner *v.* McMahon, 3 Q. B. 561; Cheslyn *v.* Dalby, 4 Y. & C. 238; Routledge *v.* Ramsey, 8 A. & E. 221; Waugh *v.* Cope, 6 M. & W. 824; Hart *v.* Prendergast, 14 M. & W. 741; Mills *v.* Fowkes, 5 Bing. N. C., 455; Burn *v.* Boulton, 2 C. B. 476; Cottam *v.* Partridge, 4 M. & G. 271.

[1] 55 Ill. 83.

[2] 55 Ga. 633.

[3] Hawley *v.* Keeler, 33 N. Y. 114.

was to arise, and it being one of the conditions upon which the existence of the contract depended, this was a payment at the time of the contract to take the case out of the New York statute.

In Richardson *v.* Squires,[1] the defendant sold the plaintiff thirty-one sheep, twenty of which were delivered and paid for; the contract not being in writing. In an action for damages for non-delivery of the remainder, it was held that there was an acceptance of a part of the property purchased upon the contract, and a payment of part of the purchase-money; either of which was sufficient to take the contract out of the statute and make it binding upon the parties as an executory contract.

The language of the Statute of Frauds implies that in whichever way the parties verbally agree or propose that a contract for the sale of goods, wares, or merchandise for the price of £10 or more shall be made exempt from the statute, — whether it be by the purchaser accepting and receiving part of the goods so sold, by giving something in earnest to bind the bargain or in part payment, or by making a note or memorandum of the bargain, — it must be done, if done at all, by the consent of both parties. It is obvious that it would require the consent of the purchaser to accept and receive part of the goods, and he could not receive them unless by the consent of the seller; the purchaser could not give something in earnest to bind the bargain, or in part payment, unless the seller accept and receive it; nor could a note or memorandum of the bargain be made and signed, unless by the consent of the party to be charged thereby. A valid contract is an agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act, and each acquires a right to what the other promises; but if the parties, in making a contract within the Statute of Frauds, omit to do what the statute requires to be done to make a valid contract, it requires the consent of both parties to supply the thing omitted.[2]

[1] 37 Vt. 640.

[2] A verbal agreement was entered into by the parties in Edgerton *v.* Hodge, 41 Vt. 676, on June 30, for the sale by the defendant to the plaintiff of a quantity of cheese for a greater price than $40, no part of which was delivered. On July 1 the defendant wrote the plaintiff for a payment of $50 to bind the bargain. The plaintiff, on July 2, enclosed the $50 in a letter directed to the defendant and deposited it in the post-office, which letter was delivered to the defendant on July 8. The defendant did not accept the money, but returned it to the plaintiff. The court held that, as the defendant had not authorized the transmission of the money by mail, the delivery to the post-office did not bind the defendant; and, as there was no binding contract under the statute, the money not having been accepted as a part payment, the contract could not be enforced. The court said: "Suppose it had been one stipulation of the verbal agreement on June 30 that the plaintiff should give and the defendant receive something in earnest to bind the bargain, and in pursuance of such stipulation the plaintiff had then offered to give or pay the amount so stipulated and the defendant had refused to receive it, saying that he preferred not to

Earnest does not necessarily and always transfer the title to the specific property for which it has been given. It only binds the contract. Notwithstanding the payment of earnest, if the whole price is to be paid on delivery of the thing bought, of which there was no delivery at the time of the contract, the purchaser cannot maintain detinue or trover for the property bought until he shall have paid or tendered the entire consideration; the vendor, notwithstanding such a sale, having a lien on the thing sold for the consideration or purchase-money.[1] And if a bargain be made, and earnest given, without an express agreement that

receive any money until he had delivered the whole or part of the property, or had refused to accept the money so offered, or do any other act to bind the bargain, without giving any reason for such refusal, it would be evident that he did not intend to make a binding contract. But the fact that he had made such verbal agreement to receive something or to do some other act to bind the bargain, and that the plaintiff was ready and offered to comply on his part, would not take the agreement out of the statute. A verbal stipulation to give and to receive something in earnest to bind the bargain, or in part payment, or a verbal promise to make a note or memorandum in writing necessary to exempt the agreement from the operation of the statute, is as much within the statute of frauds as is the agreement or contract taken as a whole; and a note or memorandum in relation to giving something in earnest to bind the bargain or in part payment, which is insufficient of itself to take the contract out of the statute, is also insufficient to make the contract binding upon either party."

[1] M., having borrowed some money from the plaintiffs, and agreed that they should have his "unprised" crop of tobacco for $600 a cwt., to be paid on the delivery of the tobacco, afterward sold it to the defendant. In an action of trover against the defendant the court held that, while the sum advanced was entitled to all the effect of earnest-money, there having been no actual delivery of tobacco to the plaintiffs, nor any payment or tender of the whole price agreed to be paid for it, the property in the tobacco had not been passed from the seller to the plaintiffs so as to enable them to maintain trover for the conversion of it. The quantity of the tobacco had not been ascertained, nor was it in a condition for delivery, and had the tobacco been consumed or spoiled the day after the date of the contract, without the vendor's fault, the loss would have been his, and he could not have recovered the stipulated price. Jennings *v.* Flanagan, 5 Dana (Ky.), 217. So in Neil *v.* Cheves, 1 Bail. (S. C.), 537, where there had been a part payment of $50 on account of the purchase-money of a quantity of cotton, and the purchaser had not performed his part of the contract, the court held that the payment of a part of the purchase-money at or after the contract did not operate to invest the plaintiff with a property in the cotton; and the rights of the vendors to have the whole purchase-money paid before they parted with the possession, left them at liberty to consider the contract at an end when the plaintiff failed to comply with his part of the agreement. In Nesbit *v.* Burry, 25 Pa. St. 208, which was an action of replevin for a yoke of oxen, the plaintiff agreed with the defendant for the purchase of the oxen, and paid $10 as earnest-money to bind the bargain. The proposed mode of weighing having failed, the vendors refused to deliver the oxen. The court held that after the parties had agreed upon the terms of sale and the mode of ascertaining the weight, and part of the price had been paid, and when the agreed means of weighing had failed, the refusal of the vendor to carry out the contract did not vest the property in the vendee. The court said: "The weighing being necessary to a perfect sale where there is no delivery, is not dispensed with by an unsuccessful attempt to weigh, or by a refusal to try a better mode of doing it. These matters left the parties as they stood before, and the title remained in the vendor. Nor does earnest or part payment aid in vesting the title where the quantity is yet to be ascertained and there is no delivery. Under such circumstances the contract is essentially executory, and the part payment only shows a concluded and binding agreement. Taking the facts as above stated, the sale remained imperfect and executory, and the vendor might refuse performance, subject to the vendee's right to damages for the breach." Goodall *v.* Skelton, 2 H. Bl. 316, is to the same effect.

payment is to be made at a certain time, the money must be paid before the goods are removed; and a demand of the goods without a tender of the money is void, because it is not pursuant to the intent of the bargain, and the earnest is only to bind the bargain.[1] Whether there shall have been a transmission of the property in the thing sold or not, notwithstanding earnest-money has been paid, does not alone depend on that fact, but upon the nature of the entire transaction.[2]

[1] In an action for the non-delivery of corn at S., pursuant to an agreement, whereby the defendant, in consideration that the plaintiff had bought of him a certain quantity at a fixed price, undertook to deliver it to the plaintiff at S. within one month from the time of the sale, the plaintiff must aver a tender of the price, or what is equivalent thereto; for the delivery of the corn and the payment of the price being concurrent acts, to be done by the parties respectively at the same time, each must aver performance or an offer to perform his part before he can maintain an action against the other. Morton *v.* Lamb, 7 T. R. 125; Lea *v.* Exelby, Cro. Eliz. 888; Thorpe *v.* Thorpe, Salk. 171; Callonel *v.* Briggs, Salk. 113; Kingston *v.* Preston, Doug. 688; Goodison *v.* Nunn, 4 T. R. 761; Pickett *v.* Cloud, 1 Bail. (S. C.) 362; Mattock *v.* Kinglake, 10 A. & E. 50; Standley *v.* Hemmington, 6 Taunt. 561; Heard *v.* Wadham, 1 East, 619; Glazebrook *v.* Woodrow, 8 T. R. 366; Pincke *v.* Curteis, 4 Bro. C. C. 332.

[2] Langford *v.* Adm'x of Tyler, 6 Mod. 162; 1 Salk. 113. It was held in this case by Holt, C. J., that after earnest given, the vendor (the action being between himself and the vendee) can sell to another, but if the vendee do not come to pay and take the goods, the vendor ought to come and request him to come and pay; and if he do not come in convenient time, the agreement is dissolved, and then he may sell. But in Knight *v.* Hopper, Skin. 647, where there was a sale of one hundred pieces of muslins at 40*s. per* piece, to be taken away by ten pieces at a time, and paid for as taken away; it was held, by the same high authority, that the pieces *being marked and sealed, the property was altered immediately*, and they remained only as a security for the money; and if they were not taken away upon request in a reasonable time, the vendor might have an action for his money, but yet that he might not sell the goods. The question of the rights and powers of the vendor in such cases, is thus as to whether there has or has not been a change in the property in the subject of the contract. If the property has passed to the vendee, then, though the vendor may maintain his lien for the purchase-money, he cannot pass the property in the thing to any third party. And in a case where a man comes to buy goods and offers £10 for them, and the owner agrees to accept the money, and the buyer takes away the goods without payment to the owner or delivery by him, there the vendor can maintain an action of trespass or trover, notwithstanding the bargain. But if they agree upon a price, and the vendor take the vendee's word for payment, and deliver the goods to him; there the vendor is put to his action for the money upon the contract, and trover for the goods will not lie. Manby *v.* Scott, 1 Mod. 124, 137. But the statute of frauds prevents a parol agreement to buy goods of the value of £10, without either earnest or delivery, from giving the buyer any property in them. In such case, therefore, the buyer cannot maintain trover against the vendor, who sells them to another person. Alexander *v.* Cauber, 1 H. Bl. 20. In Greaves *v.* Ashlin, 3 Camp. 426, where there was a written contract for the sale of a quantity of oats, on which an action was brought against their vendor for not delivering them, it was claimed that the defendant was entitled to re-sell the oats in the manner he had done, the plaintiff not having carried them away in a reasonable time after notice, and that, under these circumstances, the contract might be considered as dissolved, the property in the oats revesting in the defendant. But Lord Ellenborough held that the plaintiff was entitled to recover. He said: "If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room; or he may bring an action for not removing them, should he be prejudiced by the delay. When a farmer sets out his tithes, and gives the parson notice to take them away, he may bring his action if the latter does not do so within a reasonable time; but the parson's neglect *does not revest in the farmer the property in the articles set out.* In this case the notice given to fetch away the goods, could not discharge the defendant from his contract, nor empower him *to sell the property of the*

Earnest and part payment being, as we have seen, essentially the same, it necessarily follows that whatever is paid as earnest-

plaintiff." Here, evidently, Lord Ellenborough treated the property in the oats as having vested in the plaintiff, as he did the tithes as having vested in the parson. It is only on this ground, we think, that this case can be reconciled with Lord Holt's holding in Langford *v.* Adm'x of Tyler, 6 Mod. 162; 1 Salk. 113, or that this latter case can be reconciled with the holding of the same learned judge himself, in Knight *v.* Hopper, Skin. 647; in which latter case it was expressly held that the right of the vendor to rescind the contract for the non-taking away of the goods by the vendee, was gone, *because the property in the goods had vested in the vendee, and a right of action only for the money was left.* But where, as in Langford *v.* Adm'x of Tyler, must have been the case, to have made the holding there consistent with the decision in Knight *v.* Hopper, though there had been a payment of earnest-money, as there had not been a transmission of the property in the tea to the vendee, and the whole matter was simply lying in contract; there, if after notice the vendee did not elect to carry out the contract, the vendor, at his election, might treat the contract as rescinded; the matter simply lying in contract, and there having been no change in the property in the goods. The text-writers and cases have generally considered Langford *v.* Adm'x of Tyler as irreconcilable with Greaves *v.* Ashlin; but we think it is no more so than it is with Lord Holt's own holding in Knight *v.* Hopper; and as it is not inconsistent, on the ground we have placed it, with Knight *v.* Hopper, neither is it, on the same ground, inconsistent with Greaves *v.* Ashlin. In Clarkson *v.* Carter, 3 Cow. 84, the court held that in a cash sale of goods, where there had been a memorandum in writing under the statute, the vendee was not entitled to the possession until he paid the price; and, following Langford *v.* Adm'x of Tyler, 6 Mod. 162; s. c. *nom.* Langfort *v.* Adm'x of Tiler, 1 Salk. 113, it was held (the property in the goods, as in Langford *v.* Adm'x of Tyler, not having passed), that the vendee not having accepted the goods on request, the agreement was dissolved, and the vendor was at liberty to sell the goods to any other person. But, not consistently with Langford *v.* Adm'x of Tyler, it was further held in Clarkson *v.* Carter, 3 Cow. 84, that the vendor, on electing to treat the contract as rescinded, had still an action on the contract against the vendee for the loss on the sale of the goods to another party, notwithstanding the rescission or dissolution of the contract. We think, on the principle of the above decisions by Lord Holt and Lord Ellenborough, that, notwithstanding the case was taken out of the statute by the payment of earnest, or by a note or memorandum in writing, if there had been a transmission of the property in the goods, the vendor could not, of his own mere motion, rescind the sale, but would be put to his action for payment for the goods sold; retaining his lien for the price. But, on the other hand, if there had been no transmission of the property in the goods, and the vendee did not perform his contract, there the vendor might elect to enforce the contract by action; or, on the other hand, might, after notice, elect to dissolve or rescind the contract. But, we think, on principle, if he elected the latter course, the rescission would be a rescission *ab initio*, and that he could not both rescind the contract and also enforce it, as, in effect, it is held in Clarkson *v.* Carter, 3 Cow. 84, he might do. On this latter point, the court followed the decision of the Supreme Court of New York in Sands *v.* Taylor, 5 Johns. 395, where it was held that where the vendee refused to accept the goods, the vendor could re-sell them and sustain an action against the first vendee for the difference in price. The court were under the impression that the case, with the exception of an unreported case in the New York Supreme Court of Heermance *v.* Yeomans (cited in Sands *v.* Taylor, 5 Johns. 402, 406), was one of first instance; the case of Knight *v.* Hopper, Skin. 657, having escaped them, and Greaves *v.* Ashlin, 3 Camp. 426, not having been then decided. Van Ness, J., relied on and assumed to follow Lanford *v.* Adm'x of Tyler, 6 Mod. 162; 1 Salk. 113, not noticing that Lord Holt there, in holding that the vendor was at liberty to re-sell the goods, did so on the ground that *the agreement was dissolved;* but not holding that the vendor could both re-sell the goods on the ground that the agreement was dissolved, and recover against the first vendee for the loss on the re-sale, on the ground that, notwithstanding his election to dissolve the contract of sale, it still existed; the very opposite to which has been held, as we have seen, by Lord Holt himself, in Knight *v.* Hopper, Skin. 647, and, subsequently, by Lord Ellenborough, in Greaves *v.* Ashlin, 3 Camp. 426. Kent, C. J. (afterward, Kent, Chancellor,) in Sands *v.* Taylor, also concurred with the other judges in their holding in that case, resting on the *dicta* of Parker, L. C., in Cuddee *v.*

money or as part payment becomes, on completion of the contract, a part of the purchase-money, to be appropriated to the contract. It also, therefore, follows that where there has been a mutual rescission of the contract, the vendee has a right to a return of the money paid as earnest or part payment.[1] But where money is deposited, not as a part payment, or earnest to bind the bargain, but as a forfeiture, there the same principle does not apply; and the deposit of the money as a forfeiture is not the payment of earnest, or part payment, to take the case out of the statute, and is not recoverable back.[2]

Rutter, 5 Vin. Ab. 538, pl. 21; s. c. *nom.* Cud *v.* Rutter, 1 P. Wms. 570. But that was an entirely different case from Sands *v.* Taylor. Cuddee *v.* Rutter was the case of a bill in equity filed *by the vendee* for the specific performance of a contract to transfer stock, for which earnest-money had been paid. The court held that the bill would not lie, as there was an adequate remedy at law; but, under the circumstances, ordered an inquiry as to the difference in value between the stock at the date when it should have been delivered, and the selling price at that time. Here the vendee sought an enforcement of the contract. This is very different from the vendor electing to dissolve or rescind the contract, and, at the same time, seeking to enforce it as a subsisting contract. There is an early Pennsylvania case (Girard *v.* Taggart, 5 S. & R. 19) where it was held that where goods are sold at public auction on a credit, and the vendee afterwards refuses to take them, the owner may, *before the expiration of the credit*, re-sell the goods and maintain an action for the difference between the original selling price and the amount realized for the goods. This case, too, is in direct conflict with the holding of Lord Holt, in Knight *v.* Hopper, Skin. 647, and of Lord Ellenborough in Greaves *v.* Ashlin, 3 Camp. 426. The ground upon which the decision is put in Girard *v.* Taggart, 5 S. & R. 19, we think, fully shows its unsoundness. The court said: "The buyer, after having disaffirmed the sale as far as he could by acts of his own, must not be permitted to treat the contract as still existing for the purpose of being performed by him, specifically; but the seller may, if he please, consider it existing only for the purpose of giving a remedy for its breach." We very much doubt the soundness of this distinction. We think the vendor cannot assume both that the contract has been rescinded and, at the same time, that it has not been rescinded. As we have seen, if the property has not passed, he can elect to enforce the contract, or to accept its rescission. If he elect to enforce it, he has a full remedy for the breach; but if he elect to rescind it, as there is no contract, so there can be no breach — of contract. See Mussen *v.* Price, 4 East, 147; De Symons *v.* Minchwick, 1 Esp. 430; Dutton *v.* Solomonson, 3 B. & P. 582; Brooke *v.* White, 1 B. & P. N. R. 330, in which, as in many other cases, it is held that where goods are sold on credit, an action will not lie on the contract for the goods sold, until the expiration of the credit, except in a case of fraud; that is, that the vendor cannot treat the contract as repudiated and rescinded, and yet recover on it as though it were not repudiated and rescinded. In Healy *v.* Utly, 1 Cow. 345, where there had been a sale of oars, which was subsequently rescinded between the parties, it was held that, as the acts of the vendor amounted to an assent to a rescission of the contract, the vendor on a re-sale of the oars could not recover against the first vendee for the loss on the re-sale. This case, in principle, is identical with the holding of Lord Holt in Knight *v.* Hopper, Skin. 647, and of Lord Ellenborough in Greaves *v.* Ashlin, 3 Camp. 426. Where the goods are of a perishable character, the case is an exceptional one, and a different rule applies. There, by the second sale, the original contract is not rescinded or dissolved, but the doctrine of agency of necessity applies, and the vendor, by necessity, becomes the agent of the vendee to get the price that is obtainable for the goods. We consider the whole question fully in a later portion of this work.

[1] See *ante*, n. 2 to p. 284.

[2] Thus, in Howe *v.* Hayward, 108 Mass. 54 (stated *supra*), where there was a mutual deposit of $200 each between the parties to an oral contract for a sale, "as a forfeiture, to be paid over to the party who was ready to perform the contract, if the other party neglected to do so," it was held that as earnest is regarded as a part

An alteration by parol of the terms of a written contract under the provisions of the Statute of Frauds is not binding, for the reason that the alteration creates a new contract which it would be necessary to prove partly by parol evidence; and this principle applies as well to contracts for the sale of goods, wares, and merchandise as for the sale of lands.[1] But where a contract for the sale of goods is taken out of the statute by the payment of earnest-money, and is not reduced to writing, it does not contravene the spirit or policy of the statute to allow its terms to be varied by parol, any more than it would be to allow the terms of the original contract to be thus proved. In such a case, the original contract is treated as still remaining, and no new consideration is requisite for an alteration of its terms in respect to the time for its performance, "the consideration for the old agreement being imported into the new agreement which is substituted for it."[2] It is competent for the parties to the oral contract to extend or vary the time for its performance by a subsequent parol agreement, at any time while it remains executory, without any new consideration.[3]

payment of the price, 2 Bl. Com. 447; Pordage *v.* Cole, 1 Saund. 319 *b*; Langford *v.* Tiler, 1 Salk. 113; Morton *v.* Tibbett, 15 Q. B. 428; Walker *v.* Nussey, 16 M. & W. 302; 1 Dane Ab. 235; the deposit of the $200 as a forfeiture was not equivalent to an earnest to bind the bargain, or part payment, and there was not a valid sale within the statute of frauds. So, in Noakes *v.* Morey, 30 Ind. 103, where there was a parol contract for the sale of goods to be delivered at a future time, and there was a deposit of a check for $600 as a forfeiture, it was held that this was not earnest to bind the bargain, or part payment, to take the case out of the statute of frauds.

In Howe *v.* Smith, 27 Ch. Div. 89, on a sale of real estate, the purchaser paid $500, which was stated to be paid "as a deposit, and in part payment of the purchase-money." The contract provided that the purchase should be completed on a day named, and that if the purchaser should fail to comply with the agreement the vendor should be at liberty to re-sell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase-money, and after repeated delays, the vendor re-sold the property for the same price. On an action for specific performance, the court having held that the purchaser by his delay had lost his right to enforce specific performance, held, further, that the deposit, although to be taken as part payment if the contract had been completed, was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit. See further, Collins *v.* Stimson, 11 Q. B. Div. 142; Essex *v.* Daniell, L. R. 10 C. P. 538; *Ex parte* Barrell, L. R. 10 Ch. 512; Hinton *v.* Sparkes, L. R. 3 C. P. 161; Casson *v.* Roberts, 31 Beav. 613; Laird *v.* Pim, 7 M. & W. 474; Icely *v.* Grew, 6 Nev. & M. 467; Gee *v.* Pearse, 2 De G. & Sm. 325; Palmer *v.* Temple, 9 A. & E. 508; Depree *v.* Bedborough, 4 Giff. 479; Ockenden *v.* Henly, E. B. & E. 485, 492.

[1] Stead *v.* Dawber, 10 A. & E. 57; Marshall *v.* Lynn, 6 M. & W. 109; Goss *v.* Lord Nugent, 5 B. & Ad. 58; Blood *v.* Goodrich, 9 Wend. 68, 79.

[2] *Per* Lord Denman, in Stead *v.* Dawber, 10 A. & E. 57.

[3] Packer *v.* Steward, 34 Vt. 127, 131. There are cases where the time of performance of a written contract may be enlarged by parol. Keating *v.* Price, 1 Johns. Cas. 22; Erwin *v.* Saunders, 1 Cow. 249; Frost *v.* Everett, 5 Cow. 497. But this does not apply to any contract where the contract itself would not have been valid if made by parol. Blood *v.* Goodrich, 9 Wend. 79. In Keating *v.* Price, 1 Johns. Cas. 22, it is said: "This being originally a simple contract, we are

of opinion that it was competent for the parties, by parol agreement, to enlarge the time of performing it." And see Fleming *v.* Gilbert, 3 Johns. 527; Langworthy *v.* Smith, 2 Wend. 587; Dearborn *v.* Cross, 7 Cow. 50; Neil *v.* Cheves, 1 Bailey, 537; Franklin *v.* Long, 7 G. & John. 407; Robinson *v.* Batchelder, 4 N. H. 40; Low *v.* Treadwell, 3 Fairf. 441; Cummings *v.* Arnold, 3 Metc. 486, 489; Richardson *v.* Hooper, 13 Pick. 446; Monroe *v.* Perkins, 9 Pick. 298; Trumbo *v.* Cartright, 1 Marsh. (Ky.) 582; Mossy *v.* Mead, 2 Mill (La.), 157; Benson *v.* Smith, *Ib.* 103; Perrine *v.* Cheeseman, 6 Halst. 174; Sharp *v.* Lipsey, 2 Bailey, 113.

BOOK IV.

PART VI.

THE ACCEPTANCE.

As we have seen in the previous Part, the earnest-money and the part payment to take the case out of the statute are essentially the same, and, whether called earnest-money or part payment, may be anything of value; but the acceptance and actual receipt necessary to take the case out of the statute, although often treated as being the same, are very far from being so. The language of the section is, "Except the buyer shall *accept* part of the goods so sold, *and actually receive* the same." Here, it is clear, that the *actual* receipt referred to does not mean, exclusively, a *manual* receipt; for there are many cases where an actual manual receipt is, in the nature of things, quite out of the question. And there is no reason why a constructive or symbolical delivery would not be as good, within the meaning of the statute, as distinguished from an actual manual delivery, as in ordinary cases where the circumstances of the case render good at common law a constructive or symbolical delivery.

The term, "AND *actually receive* the same," is used then, we think, in contradistinction to the previous clause of the section, "except the buyer shall *accept* part of the goods so sold" (the acceptance being one thing, and the receipt quite another), and not in contradistinction to the particular mode of receipt, whether manual, constructive, or symbolical. He shall (1) accept; but he shall not only *accept*, but he must (2) also *actually receive*. The term here, "accept," is clearly not used as a synonym for "receive" (which is one of its meanings, although a minor one); for we would then have the absurd tautology, "he must receive *and* actually receive," which would be nonsense. But the term "accept," more properly, and as used in the statute unquestionably means, the approving, the recognition as an act of the mind, of the particular subject as the subject of the contract; which

accepting, recognising, approving, taking to as the subject of the contract, is essentially different from the actual receipt of the goods, whether such actual receiving be a manual, constructive, or symbolical process. The subject of the purchase, then, to meet the requirements of the statute, must not only have the purchaser's acceptance, acceptation, recognition as an acceptance, or taking to of the subject as the subject of the contract, but in addition to this act of the mind as accepting, — thus recognising, approving, and taking to the particular subject, as an act of the mind, as the subject of the contract, — there must be the actual receipt of the subject, which actual receipt, as we have seen, may be, in the customary manner of receipts at common law, — manual, symbolical, or constructive.

So, again, as the receipt may be manual, symbolical, or constructive in cases generally where these different modes of receipt are respectively good at common law, so the acceptance may be either express or implied; [illegible]where not expressed has, in many cases, been implied; where, after the receipt, there has been such dealing with the goods by the vendee, or such delay by him in failing to repudiate the delivery, as fairly to raise the implication that he has not only actually received the goods but has also *actually accepted* them. The acceptance is the act of the mind, and fixes the subject of the contract; the receipt by the vendee, after or connected with the acceptance, is the transfer of the possession and property of and in the goods to him, and, under the statute, not only proves the contract, but in effect vests the title in the goods in him. So, as an act of the mind, independent of the manual act of the delivery and receipt, the acceptance may be either prior to, concurrent with, or subsequent to the receipt. Yet such acceptance as an act of the mind, though treated in the statute as an entity independent of and apart from the actual receipt, may not only, as we have seen, be implied by *laches*, or by a subsequent dealing with the goods by the vendee after their receipt; but, manifestly, in many cases such acceptance may be implied from the actual receipt itself. This fact will probably account for the confounding, in many of the cases, of the acceptance of the goods with their receipt, as though in all cases the receipt implied the acceptance; or that the words in the statute, "accept *and* actually receive," meant merely "receive."

As both the acceptance and actual receipt are required to take the case out of the statute, it therefore necessarily follows that where there has been either an acceptance without the receipt, or a receipt without the acceptance of part or the whole of the goods, there is no binding contract; and hence, where both of

these do not concur, neither party to the inchoate contract, seller or buyer, is bound by it.[1]

A purchaser of goods may *actually receive* them; may examine them, and *reject* them. Rejection, here, is the correlative not of the actual receipt, but of the acceptance. He has received them; has not accepted them, but has rejected them. Not having previously accepted them, the rejection here is the exact opposite of the acceptance which the statute renders necessary in addition to the actual receipt to bind the contract. This, it seems to us, shows in a few words the meaning of the acceptance *and* actual receipt named in the statute, and furnishes the necessary clue by which to judge as to whether any particular case has or has not been taken out of the statute.

Again, at the time of the purchasing of the goods, the purchaser may then examine them, approve of them, accept them as the very subject of the contract; but this approval, acceptance, taking to the goods as the subject of the contract, must be accompanied with or followed by an actual receipt. And unless there is, in addition to the acceptance, also the actual receipt, the requirements of the statute are not complied with. From this it follows, that, as the contract is *in fieri* until there is both an acceptance and receipt, when the purchaser has received the goods, and has not accepted them, he may reject them. So, again, where there has been an "acceptance" of them, but no actual receipt, the contract still remaining *in fieri;* he may at his election, notwithstanding his previous "acceptance," refuse their "actual receipt" (the refusing to receive, here, being the correlative not of the acceptance, but of the actual receipt), and thus,

[1] If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with unless the two things concur: the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind; for as there may be an actual receipt without any acceptance, so there may be an acceptance without any receipt. In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final; that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the reason is not whether he ought to accept, but whether he *has* accepted them. The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts. The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed the receipt by the buyer may be, and often is for the express purpose of seeing whether he will accept or not. Blackburn on Sales (2d ed.), 16, 17.

in either of these cases, put an end to the inchoate contract; because, both the acceptance and the actual receipt being necessary before such a contract "shall be allowed to be good" under the statute, the failure of either of these necessary ingredients will leave the contract such as shall not "be allowed to be good" under the statute, and therefore incapable of being enforced.

We examine the cases on the subject chronologically and exhaustively. In Searle *v.* Keeves[1] there was no actual receipt of the goods in the sense of a manual receipt. The sale was of a quantity of rice in the warehouse of B., a third party; and it was held by Eyre, C. J., that the delivery of an order by the vendor to the vendee, on B., which was delivered by the vendee to B.'s warehouseman, was a delivery of the goods to take the case out of the statute.[2] So, in Chaplin *v.* Rogers,[3] after a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person, by whom, though against the vendee's approbation, it was taken away, the jury having found that there was an acceptance of the hay by the defendant, and a delivery of it to him, the court held that there was sufficient evidence of acceptance and delivery to the defendant to leave to the jury, and on their so finding, as above, to take the case out of the statute.[4]

[1] 2 Esp. 598.

[2] A. agrees to sell goods to B., who pays a certain sum of money as earnest; the goods are packed in cloths furnished by B., and deposited in a building belonging to A. till B. shall send for them; but A. declares at the same time that they shall not be carried away till he is paid. This not being a delivery to B., A. cannot maintain an action for goods sold and delivered. Goodhall *v.* Skelton, 2 H. Bl. 316. But a shilling earnest having been paid to bind the bargain, an action for goods bargained and sold would have been sustained. Simmons *v.* Swift, 5 B. & C. 277; Atkinson *v.* Bell, 8 B. & C. 857; Boulter *v.* Arnott, 1 Cr. & M. 333; Norman *v.* Phillips, 14 M. & W. 277; Cunliffe *v.* Harrison, 6 Ex. 903; Acraman *v.* Morrice, 8 C. B. 849; Bushell *v.* Wheeler, 15 Q. B. 442; Edan *v.* Dudfield, 1 Q. B. 302; Lillywhite *v.* Devereaux, 15 M. & W. 285, 291; Elliott *v.* Heginbotham, 2 C. & K. 545; Alexander *v.* Gardner, 1 Scott, 630; Archer *v.* Baynes, 5 Ex. 625; Siveright *v.* Archibald, 17 Q. B. 103; Acebal *v.* Levy, 10 Bing. 376; Ashcroft *v.* Morrin, 4 M. & G. 450.

[3] 1 East, 192.

[4] In so holding, Lord Kenyon, C. J., in delivering the judgment of the court, said: "It is of great consequence to preserve unimpaired the several provisions of the statute of frauds, which is one of the wisest laws in our statute book. My opinion will not infringe upon it; for here the report states that the question was specifically left to the jury whether or not there was an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law. I do not mean to disturb the settled construction of the statute, that in order to take a contract for the sale of goods of this value out of it there must be either a part delivery of the thing or a part payment of the consideration, or the agreement must be reduced to writing in the manner therein specified; but I am not satisfied in this case that the jury have not done rightly in finding the fact of a delivery. Where goods are ponderous, and incapable as here of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property. Now, here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another

Kent *v.* Huskinson[1] was an action for goods sold and delivered; the subject of the action being a bale of sponge of a greater value than £10. The defendant gave a verbal order for the sponge, but, on its receipt, the defendant after examination of it refused to accept it. The plaintiff having been nonsuited, on the ground that the case was within the seventeenth section of the statute, on motion to set aside the nonsuit it was claimed that the receipt of the sponge and the opening of the bale and subjecting it to examination was an acceptance, even though the quality of the sponge proved to be different from that which was purchased, which was a question for the jury. But the court sustained the nonsuit. Lord Alvanley, C. J., said: "The only affirmance of any contract to be collected from the evidence is an affirmance of some sort of order for some sort of sponge, and it appears that the moment the article reached the defendant, and was examined, he sent it back to the plaintiff, saying it was not that sort of sponge which he wanted and had ordered. The defendant's letter cannot, as it appears to me, be construed into anything like an acceptance, so as to bring the case within the exception relied on." And Heath, J.: "According to the words of the statute, the exception does not apply, unless the vendee *both receive and accept*. Now that acceptance I cannot consider to be any other than the ultimate acceptance, *and such as completely affirms the contract*." And Chambre, J. "Certainly there was no acceptance of the goods by the defendant, unless we can consider a refusal to accept as amounting to an acceptance." This case is a noted one, and deserves constantly to be kept in mind, when later cases are being considered.

The question arose in Hinde *v.* Whitehouse[2] whether sales by auction are within the statute. It was not, however, necessary there to decide the question.[3] In this case, after the biddings had closed, samples of half a pound weight from each hogshead of the sugar which was sold, and which samples were drawn from the hogsheads after the sugar had been weighed, were delivered to and accepted by the purchaser, according to the usual practice at

person. Therefore as upon the whole justice has been done, the verdict ought to stand." The other judges agreed that there was sufficient evidence of a delivery to and acceptance by the defendant to leave to the jury.

[1] 3 B. & P. 233.

[2] 7 East, 558.

[3] It was very strongly questioned by Lord Mansfield, C. J., and by Wilmot, J., in Simon *v.* Metivier, 1 W. Bl. 599, 601 (s. c. 3 Burr. 1922), whether sales by auction are within the statute on the ground of the publicity attending such sales. In Hinde *v.* Whitehouse, 7 East, 558, 568, Lord Ellenborough was very clearly of the opinion that such sales are within the statute; and it has long since been so settled. See Kenworthy *v.* Schofield, 2 B. & C. 945; Walker *v.* Constable, 1 B. & P. 306; Emmerson *v.* Healis, 2 Taunt. 38; White *v.* Procter, 4 Taunt. 209; Kemeys *v.* Proctor, 3 Ves. & B. 57.

such sales, as part of his purchase, to make up the quantity weighed. The court held that, assuming the sale by auction to be within the seventeenth section of the statute, there had been a sufficient acceptance and receipt of part of the sugar to take the case out of the statute. Lord Ellenborough, in delivering the judgment of the court, said: "Inasmuch as the half-pound sample of sugar out of each hogshead in this case, is, by the terms and conditions of sale, so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting a part of the bulk actually weighed out to the buyer, and to be allowed for specifically, if he should choose to have the commodity re-weighed; I cannot but consider it as part of the goods sold under the terms of the sale, *accepted and actually received as such by the buyer.* And, although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent also, in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, as a part delivery of the thing itself, as soon as in virtue of the bargain the buyer should be entitled to retain, and should retain it accordingly." But in Klinitz *v.* Surry,[1] where it was held by Lord Ellenborough that when goods are sold by sample, and the sample delivered is part of the bulk, standing as a distinct parcel, so that the bulk as sold as an ascertained quantity is diminished by the sample, there there is a part delivery; the jury having found that the bulk and sample did not correspond, the verdict, in an action against the defendant for not accepting the goods, was for the defendant.[2] The holding in this case accords with the views of the statute expressed by us in fully examining the subject of sales by sample, *infra.*

In Hodgson *v.* Le Bret,[3] in an action for goods sold and delivered, the evidence was that the defendant came to the plaintiff's shop, and purchased of him a piece of linen, and several pieces of muslin, at separate prices. The defendant wrote her name upon the linen at the time; but the muslin was not then produced. None of the goods were sent home to her till some months afterwards, when she refused to receive them, saying that she had not bought them. Lord Ellenborough held, that if the defendant's purpose in writing her name upon the linen was thereby to denote that she had purchased it, and to appropriate it to her own use,

[1] 5 Esp. 267.

[2] And see Cooper *v.* Elston, 7 T. R. 14, where it was held that a sale of goods for more than £10, by sample, in one place to be afterwards delivered at another, is within the 17th section of the statute, if no part of the goods were delivered, nor anything given by the buyer to bind the bargain, nor any memorandum of the bargain in writing.

[3] 1 Camp. 233.

that would be sufficient as to the linen itself; but that as nothing had been written on the muslins, and as they had not even been produced to the defendant along with the linen, the sale as to them was void by the statute. And, in Anderson *v.* Scot,[1] which was special assumpsit for the non-delivery of wine, it appeared that the plaintiff went into the defendant's cellar, and selected several pipes of wine, for which he agreed, by parol, to pay a certain price. The spills, or pegs by which the wine is tasted, were then cut off; plaintiff's initials were marked on the casks by defendant's clerk in his presence, and plaintiff took the gauge numbers. It was objected that this sale was within the statute; but Lord Ellenborough held that the cutting off of the spills, and the marking of plaintiff's initials on the casks by defendant's agent, in the presence of all the parties, amounted to a delivery. It was then contended that this proved the contract laid in the declaration to have been performed; the plaintiff having complained of a non-delivery of the wine, and having proved a delivery. To which, Lord Ellenborough observed, that although there had been an incipient delivery, sufficient to take the case out of the Statute of Frauds, yet the delivery not having been perfected, plaintiff had a right, in that form of action, to recover damages for the non-completion of the contract.

In this case we think the contention of the counsel was right, and the decision of Lord Ellenborough, wrong. If, as was held in the case, the statute was satisfied, then there must have been an acceptance of the goods and actual receipt of them. There was, then, the statutory evidence of the contract of sale, which contract was "good," and under which, as at common law, both the property and the possession absolutely passed to the vendee. Then, there was the actual receipt and the actual delivery. The statute makes no provision for an "incipient" receipt. It must be an actual receipt, but as we have seen, that actual receipt may, like any ordinary actual receipt at common law, be manual, symbolical, or constructive; where, at common law, these particular modes of receipt were and are good. The action, then, as both the property and constructive or symbolical possession had passed to the vendee, should not have been for a non-delivery; for, as was proved, contended, and held, there had been a delivery,—an "actual" delivery and receipt. As both the property and possession in the goods had passed, the withholding was wrongful, and the action should have clearly been in trover or replevin, where the old common-law action of detinue has become obsolete. The acceptance and actual receipt in this case were of the whole

[1] 1 Camp. 235, n.

goods. This, therefore, is distinguishable — a fact, not generally observed — from the case where there have been an acceptance and receipt of only part of the goods. In this latter case, the contract is proved; but, except where the part is delivered in the name of the whole, so as to amount to an actual delivery and receipt of the whole, there is no transmutation of the possession to the vendee, except in the part actually delivered and received. Hence, for the undelivered part, the action, as in Anderson *v.* Scot,[1] for the non-delivery of the goods, would well lie; but not, we think is quite manifest, where, as in the case of Anderson *v.* Scot, there have been both an acceptance and "actual receipt," and, therefore, necessarily, not what Lord Ellenborough calls an "incipient," but an "actual" delivery of the whole. We consider this subject more fully and particularly in the latter part of this, and in the next succeeding Part of this work. And see Wright *v.* Percival,[2] stated *infra.*

It was held, by Chambre, J., in Hart *v.* Sattley,[3] where goods were ordered verbally, to be shipped by a carrier, who had been in the habit of receiving goods for the purchaser from the vendor, that, under the circumstances, the purchaser must be considered as having constituted the carrier his agent to accept and receive the goods.[4]

Elmore *v.* Stone,[5] was an action brought to recover the price of two horses, which it was contended had been sold to the defendant. The price for the horses having been fixed, the defendant sent the plaintiff word to keep the horses at livery for him, and the plaintiff then removed the horses out of his stable into another stable. It was claimed that such a constructive delivery would not avail to take the case out of the statute. The court held that the horses were completely the property of the defendant, and that when they stood at the plaintiff's stables, they were in effect in the defendant's possession, the plaintiff's lien being gone, so that he could not have retained the horses, although he had not

[1] 1 Camp. 235, n.
[2] 8 L. J. N. S. Q. B. 258.
[3] 3 Camp. 528.
[4] As in this case the order was for a particular article, a hogshead of gin, the case probably means no more than that the carrier in this case had the authority of the vendee to receive the goods for him. And see Astey *v.* Emery, 4 M. & S. 262, stated *infra*, where it was held that the carrier was not the purchaser's agent for receiving the goods under the facts in that case. "Accepting" is again the term used in this case. It is one of the cases where, evidently, the statutory term is carelessly used, as though it meant the actual receipt named, instead of the "accepting" of the statute. Generally the carrier, though he is constituted the agent to carry and to deliver the goods for the shipper, is not the agent to "accept" them, or to actually receive them for the vendee, within the statute, to bind the vendee. See Hanson *v.* Armitage, 5 B. & Ald. 537; Johnson *v.* Dodgson, 2 M. & W. 656; Norman *v.* Phillips, 14 M. & W. 277; Hunt *v.* Hecht, 8 Ex. 814; Acebal *v.* Levy, 10 Bing. 376; Meredith *v.* Meig, 2 E. & B. 370; Cusack *v.* Robinson, 1 B. & S. 299; Hart *v.* Bush, E. B. & E. 494; Smith *v.* Hudson, 6 B. & S. 431; and see our full discussion of the subject, *infra.*
[5] 1 Taunt. 458.

received payment for them. Lord Mansfield, in delivering the judgment, said: "There are many cases of constructive delivery, where the price of goods may be recovered in a count for goods sold and delivered, instead of a count for goods bargained and sold. A common case is that of goods at a wharf, or in a warehouse, where the usual practice is, that the key of the warehouse is delivered, or a note is given addressed to the wharfinger, who in consequence makes a new entry of the goods in the name of the vendee, although no transfer of the local situation or actual possession takes place. Thus in the present case, after the defendant had said that the horses must stand at livery, and the plaintiff had accepted the order, it made no difference whether they stood at livery at the vendor's stable, or whether they had been taken away and put in some other stable. The plaintiff possessed them from that time, not as owner of the horses, but as any other livery stable might have them to keep."

Assumpsit was brought in Astey *v.* Emery,[1] for goods sold and delivered. The facts were that L., a corn-factor at N., agreed to sell barley of the plaintiff to the defendant, to be delivered at L.'s warehouse at D., to go by the first boat of L. which went from N. to D., at 38*s.* per quarter, which was a higher price on account of it having to be delivered at L.'s expense. The barley being then in the hands of T., the defendant desired him to see it delivered and measured and put up properly. The barley was sent by L.'s first boat, and the invoice was delivered to the defendant, who requested time to pay, but afterwards refused to receive[2] the barley. It was held that the defendants' having appointed the particular boat, and having desired T. to inspect the loading, did not take the case out of the statute. The case was clearly correctly decided, as there was no actual receipt by the defendant, the goods being sold to be delivered to the defendant at his warehouse at D., and therefore the receipt by the carrier at N. was not a receipt by the defendant at D. This is really the gist of the decision; Bayley, J., saying: "At the time when T. was to inspect the loading of the goods, it is plain that the vendee had no right to have them, for they were *to be delivered* at D." And Dampier, J., "This is no more than the case of a farmer who sells his corn to a miller *to be delivered* at the mill." Lord Ellenborough uses the term "acceptance;" but it is done carelessly as though it were synonymous with the "receipt" of the statute. The facts seem to show an acceptance

[1] 4 M. & S. 262.

[2] "Accept" is the term used in the reporter's note of the case. And throughout the whole case "accept" is improperly used as though it were synonymous with the "actual receipt" required by the statute. The cases are very numerous, both in England and in this country, where this mistake is made, the inaccuracy leading to many unsound decisions.

of the goods within the meaning of the statute; but that the contract was rescinded by the defendant by his refusal to receive them. The contract was here, clearly, so far completed, as that it could have been enforced, but for the want of the "actual receipt" required by the statute.[1]

The case of Blenkinsop *v.* Clayton,[2] is, in principle, very similar to Astey *v.* Emery.[3] In Blenkinsop *v.* Clayton, as in Astey *v.* Emery, there seems to have been ample evidence of an acceptance,[4] but the question really rose as to the actual receipt. After the defendant, in Blenkinsop *v.* Clayton, had bought the horse which was the subject of the action, he brought a chapman to the vendor's stables, and stating to him that he had bought the horse, offered to sell it to him at a profit of £5, which the other, discovering a supposed unsoundness, declined; in consequence of which discovery the defendant declined the purchase. The plaintiff, to prove that there was an actual receipt by the defendant, relied on Chaplin *v.* Rogers,[5] Elmore *v.* Stone,[6] and Searle *v.* Reeves,[7] stated *supra*. The defendant denied that there was any constructive delivery. The court held that there was some evidence of a delivery for the jury, and, on that ground, ordered a new trial. The court, however, evidently thought the evidence of an actual receipt very slight, as distinguishing it from Chaplin *v.* Rogers; Gibbs, C. J., saying: "This is very different from the case of the hay-stack, for there nothing more could be done to confer a possession." The case shows, though, as does Astey *v.* Emery, the material distinction between the accepting and the actual receipt required by the statute.

In Talver *v.* West,[8] as in Hinde *v.* Whitehouse[9] and Klinitz *v.* Surry,[10] stated *supra*, p. 322, the reliance to take the case out of the statute was placed on the acceptance and actual receipt of

[1] The apparent inaccuracy in the holding in Astey *v.* Emery, 4 M. & S. 262, has escaped the notice of both Blackburn and Benjamin. The former able writer has no reference to it whatever. Benjamin cites it incorrectly as sustaining the following position: "It is settled that the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute an acceptance, these agents having authority only to receive, not to accept, the goods for their employers." Benjamin on Sales, § 160. But the *ratio decidendi* of Astey *v.* Emery really is that in that case the carrier had not the authority of the purchaser to "receive" the goods *for him* at all, the goods being receivable by the purchaser, not at N., where they were delivered to the carrier by the vendor, but at D., the contract in the mean time being rescinded by the purchaser as the effect of his refusal to actually receive the goods. In Anderson *v.* Hodgson, 5 Price, 630, in an action for goods sold and delivered, a nonsuit was sustained where a verbal order was given for goods to be left at a named quay till called for, no acceptance of the goods nor receipt at the quay by the vendee having been shown. See Vale *v.* Bayle, Cowp. 294; Dawes *v.* Peck, 8 T. R. 330; Dutton *v.* Solomonson, 3 B. & P. 584; Snee *v.* Prescott, 1 Atk. 248.

[2] 7 Taunt. 597.

[3] 4 M. & S. 262.

[4] See Blackburn on Sales (2d ed.), p. 29.

[5] 1 East, 192.

[6] 1 Taunt. 458.

[7] 2 Esp. 598.

[8] Holt, 178.

[9] 7 East, 558.

[10] 5 Esp. 269.

samples of the goods purchased; and here, as there, it was in effect held that the delivery of a sample, which is no part of the commodity, will not take the case out of the statute; but if the sample delivered is to be considered as part of the thing sold, it then binds the contract. It is then an execution of the bargain. Gibbs, C. J., in so holding, in Talver *v.* West, said, "The sale in this case was complete when the invoice was delivered and the defendant afterwards took samples. He took them for his own use. They were delivered to him as part of the bulk, — not as an ordinary sample to guide his judgment previous to a purchase, but in order to give him possession of the thing itself. The statute, therefore, does not apply."

As the statute provides that the acceptance and actual receipt of "*part* of the goods sold" make the contract good, no more requiring any definite part of the goods sold to be so accepted and received than it prescribes the definite thing which is to be given as the "*something* in earnest to bind the bargain, or in part payment," — as, in the latter case, anything of value is sufficient to fulfil the requirements of the section, so the acceptance and actual receipt of any part of the commodity of the actual goods sold is sufficient to take the case out of the statute. Manifestly, then, as these cases hold, the acceptance and actual receipt of a sample which is no part of the commodity or bulk of the goods sold, although it may be of the same description, is not an acceptance and actual receipt of part of the goods sold. But, in this connection, there is this further important point: While the acceptance and actual receipt of a sample, as part of the actual commodity of the goods sold, is sufficient to take the contract for the sale of *all the goods sold* out of the contract, yet, manifestly again, it is sufficient to take the contract for the goods *sold*, only, out of the statute. Hence it follows that if, after the sample has been accepted and actually received, further goods are delivered and actually received as and for the balance of the goods sold, of which, as a part, the sample has been accepted, and, after their receipt by the vendee, on an examination of them, — and there has been no dealing with the goods or *laches* on the vendee's part, from which an acceptance could be fairly implied, — and the goods turn out to be not according to the sample, then, notwithstanding the actual receipt, the vendee has the right to refuse to accept them, and can reject them, the acceptance and receipt of the sample not being an acceptance of goods not in accordance with the sample, and of which the sample accepted is not a "part."[1] The soundness of this principle can scarcely be ques-

[1] See Klinitz *v.* Surry, 5 Esp. 267, stated *ante*, p. 322.

tioned; but it will be found in some of the cases that this, like the clear distinction between the "acceptance" and the "actual receipt" of the statute, has not had the prominence accorded it to which it is entitled. This much, here, *en passant*, for the present. We revert to the subject again.

An action for goods bargained and sold was brought in Howe *v.* Palmer,[1] the defendant having verbally agreed to buy twelve bushels of tares at £1 per bushel (a sample of which was shown him), the defendant to send to the plaintiff's farm to take them away. The sample was offered him; but he declined taking it, saying that he had seen the tares on plaintiff's premises, and that he had no immediate use for them, and therefore requested that they might remain there until he wanted to sow them, which was agreed to. The twelve bushels were subsequently measured and set apart in the plaintiff's granary, and orders were given that they should be delivered to defendant when he should call for them. The court, pursuant to leave reserved, made absolute a rule for entering a nonsuit. The court here, as in so many other cases, fail to make the clear distinction of the statute between the acceptance and the actual receipt required; and therefore the case is of less value on the subject than it otherwise would have been, as the points involved on the question of the acceptance apart from the actual receipt are very nice. All of the judges, Abbott, C. J., Bayley, Holroyd, and Best, JJ., treat the matter, in effect, as though the "acceptance" and "actual receipt" of the statute were simply synonymous terms. Although they verbally hold that there was no "actual acceptance or receipt of the goods,"—using the terms "accept," "acceptance," as though these were merely convertible terms for the "actual receipt" of the statute,—their whole reasoning, including their references to Chaplin *v.* Rogers[2] and Elmore *v.* Stone,[3] goes to show that they were dealing with the question whether there had been a sufficient constructive delivery and "actual receipt" of the statute, without really touching the quite different question whether the facts met the requirements of the statute as to the acceptance by the vendee of some part of the goods.[4]

[1] 3 B. & Ald. 321.
[2] 1 East, 192.
[3] 1 Taunt. 458.
[4] Thus, Abbott, C. J., says: "Unless the buyer *has accepted and received* part of the goods so sold, this case is within the statute, and no action can be brought on the verbal contract entered into between the parties. Then the question is, *Has the buyer accepted?* [While only just before stating that the questions were whether the buyer "had accepted *and* received."] Now, if he had once accepted [here probably meaning received the whole, coupled with a sufficient acceptance] he could not afterwards make any objection, even if it turned out that the tares did not correspond with the sample. But it is clear that he had a right to make any objection at the time when they were tendered to him for acceptance. [Here, clearly, meaning not "acceptance," but

Tempest *v.* Fitzgerald [1] is another case where the terms "accept" and "actually receive" are confounded. The judges here

"receipt."] If the defendant in this case had gone to the plaintiff's granary to demand the tares, and, upon inspection, had discovered that they did not correspond with the sample, it is impossible to say that he might not have made the objection. And, if so, it is clear that there was no previous acceptance [here probably meaning constructive receipt] on his part. I therefore think that this case comes within the very words of this statute, to which we ought to give full effect, and not to suffer its beneficial provisions to be evaded by subtle distinctions." And Bayley, J., dealing with Chaplin *v.* Rogers, 1 East, 192, and Elmore *v.* Stone, 1 Taunt. 458, says: "The two cases cited are distinguishable from this; for, in Chaplin *v.* Rogers, the jury thought that there was sufficient evidence to draw the conclusion of an actual acceptance, [the jury found that there was an acceptance, and also, apparently, a delivery and receipt; the court held that there was a constructive receipt, equivalent to the "actual receipt" of the statute] inasmuch as the vendee had dealt with the hay as his own. [It was, rather, on this ground that the court held that a constructive receipt was to be implied.] In Elmore *v.* Stone, the buyer directed expense to be incurred; and the directing of that expense was considered evidence of an acceptance on his part. That case goes as far as any case ought to go, and I think we ought not to go one step beyond it. There is this distinction between that case and this, that there an expense was incurred on account and by the direction of the buyer; here there is none." In Elmore *v.* Stone, stated *supra*, p. 324, there was no question as to the acceptance within the statute. What the case holds is, that, under the facts of that case, there was a constructive delivery and receipt, which met the requirements of the statute as to the actual receipt. So, Holroyd, J., is equally uncertain. He says: "In this case there has been no actual receipt of any part of the goods sold within the usual meaning of the term, and I think that what has been done ought not to be considered, in point of law, as an acceptance. For, supposing that it was made part of the contract in this case that the seller should set apart and measure the thing sold, that would not make the act of measuring amount to a virtual acceptance, or receipt of the goods by the buyer. For if they were measured by the seller only, that would not prevent the buyer, when he inspected them, from objecting either to the quantity or quality of the goods. And unless it would amount to that, it does not appear to me to be *an actual acceptance or receipt* of the goods. And supposing it not to be part of the contract, but that directions were given at the time by the buyer to the seller's agent to measure the goods for him, that would not make him the agent of the buyer so far as to make that act amount to an acceptance on his part. For an authority to measure the goods would not give him authority as agent to accept. The buyer might afterwards object that the articles did not correspond with the terms of the contract. This case differs from that of Elmore *v.* Stone; for there it was agreed between the parties that the horse should be transferred from the sale to the livery-stable, and an expense was incurred by the purchaser for the keep, which could not be unless the horse was supposed *to have come into his possession*. [That is, into his actual receipt.] I think, therefore, that as there was no acceptance [here evidently meaning receipt] by the buyer, this case falls within the words of the statute, and that the rule must be made absolute." Throughout the whole of the judgment of Holroyd, J., the terms, "actual receipt," "acceptance," "virtual acceptance," "actual acceptance," and "receipt" are all treated as convertible; and what he seems to mean is that there was not here that which would amount to a constructive receipt, leaving, as in effect do the other judges, the question of the *acceptance* apart from the *reception* (the actual receipt of the statute) out of the question. The case holds clearly that, for some reason, the contract was within the statute; less clearly, that the facts did not show such a constructive receipt as, in Chaplin *v.* Rogers and Elmore *v.* Stone, was held to amount to the actual receipt of the statute; and not at all, except as they improperly confound the words "acceptance," "actual acceptance," "virtual acceptance," with the actual receipt of the statute, whether the facts constituted an "acceptance" within the statute or not. We are quite satisfied, on grounds stated in a later part of this Part, that there was an acceptance in this case. Blackburn cites Howe *v.* Palmer, 3 B. & Ald. 321 (Blackburn on Sales, 2d ed. 29), using the language of the court, that the facts "did not amount to an ac-

[1] 3 B. & Ald. 680.

were the same as in the preceding case of Howe *v.* Palmer.[1] The case was assumpsit for the price of a horse, the declaration containing counts for horses sold and delivered, and bargained and sold. The facts were that A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon. About the expiration of that time, A. rode the horse, and gave directions as to its treatment, etc.; but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price: to this B. assented. The horse died before A. paid the price or took it away. The reporter's note is: "Held, that there was no acceptance of the horse within the meaning of the Statute of Frauds." Here, again, both by the judges and the reporter, "acceptance" is used and treated as though it meant "actual receipt." The reference by Blackburn to some of the cases we have examined is thoroughly applicable to Tempest *v.* Fitzgerald,[2] and to Howe *v.* Palmer[3] as well: "In all these cases there seems to have been ample evidence of an acceptance of the goods, but scanty evidence of any actual receipt, if by that is to be understood a taking of possession."[4] In Tempest *v.* Fitzgerald, the

ceptance *and* receipt," which, very clearly, they did not. The case, however, is not cited by that able jurist under the head of "What constitutes an acceptance" (for which it is no authority), but under the head, where it more properly comes, of "What constitutes an actual receipt." Benjamin, with his not unusual inaccuracy (Benj. on Sales, § 187), cites it as a case to show that the vendor not having lost his lien, *no actual receipt* by the purchaser had taken place; a position not really taken in the case at all. Fisher, in his Digest, employing the *word* used by the judges, cites it for that which it really ignores, that the facts did not amount to an "acceptance." Browne (on Stat. of Frauds, § 324) also incorrectly cites it as holding that the "evidence was *ample to prove a delivery*." (!) Kent cites it as holding (Com. 13th ed. p. 737, * 503), that the purchase was invalid, because there had been no measurement or separation at the time of the sale, even though the seller afterwards measured the goods off and set them apart for the vendee; while a later and much less able American writer cites it for the remarkable purpose of illustrating, in itself, the absence of "refined distinctions," and in this "*simple* case" (using the term as *plain*, and not in another and more appropriate sense), by its very clear holding, sustaining the view of Abbott, C. J., "that the statute of frauds should be *reasonably* construed." Baker on Sales, § 21. The italics are his own. The case, like many others, shows the confusion that has existed in treating the essentially different terms of the statute, "accept" and "actually receive," as though they were in effect synonymous.

[1] 3 B. & Ald. 321.

[2] 3 B. & Ald. 680.

[3] 3 B. & Ald. 321.

[4] Blackburn on Sales, 2d ed. 29. An American writer, to whom we have referred in a preceding note (Baker on Sales, § 266), says of Tempest *v.* Fitzgerald, that the court there "decided that there had been *no acceptance*;" the italics being his own. A much more careful, and, generally, a very accurate American writer, more correctly says: "In the earlier cases, the terms 'acceptance,' 'receipt,' and 'delivery' were often used as if synonymous and interchangeable; and this makes it necessary, at the present day, to notice carefully the exact sense in which they are used in those cases, when they may be cited as authority upon questions concerning 'acceptance' or 'receipt.'" And: "The term 'delivery,' which does not occur in the statute at all, has been often loosely used to denote acceptance or receipt alone, or a mixture of the two. See, for illustration of this, Searle *v.* Keeves, 2 Esp. 598, *per* Eyre, C. J.; Norman *v.* Phillips, 14 M. & W., 727, *per* Alderson, B. In Tempest *v.*

evidence clearly showed an acceptance of the horse by the purchaser, within the meaning of the statute, but not the actual receipt which is also there required.

In Parker *v.* Palmer,[1] where there had been a sale of goods by sample, and there had been no actual transfer of the goods, the court held that the vendee having acted on the contract, and treated the goods as his own, becoming a party to their sale after he became aware that they were not according to the sample, his taking upon himself the disposition of the goods was equivalent to an acceptance. Here, "acceptance" was used in the sense of both "acceptance" and "actual receipt" as these terms are used in the statute, the case itself not being one on the application of the statute.

A parol order was given by B., in Hanson *v.* Armitage,[2] for two chests of tea, to A., a merchant in London, who had been in the habit of selling goods to B., resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship. The tea, in pursuance of this order, was delivered to and "accepted by" the wharfinger to be forwarded in the usual manner. The court held that the "acceptance" not being by the party himself, was not sufficient to take the case out of the statute. Here, again, "acceptance" is used in a kind of double sense, as neither exclusively signifying acceptance nor receipt. There would seem to be here, clearly, no acceptance by the vendee within the actual meaning of the word "accept" in the statute; there being no evidence from which an acceptance could be implied.[3]

Fitzgerald, 3 B. & Ald. 680, Holroyd, J., in his opinion speaks constantly of 'acceptance,' although in reality deciding, and intending to decide, a question of 'receipt' involving the custody or possession of the chattel and the existence of the seller's lien. . And see Wright *v.* Percival, 8 L. J. Q. B. (N. S.) 258." Browne on Stat. of Fr. § 316 *a*, and note 1. Benjamin, also, correctly states the *ratio decidendi* of Tempest *v.* Fitzgerald, that the holding in it was that "there was no actual receipt" of the horse by the purchaser. Benj. on Sales, § 185. Fisher, however, in his Digest (6 Mews' Fish. Dig. 818), following the error of the reporter, says that the case holds that there was "no acceptance of the horse."

[1] 4 B. & Ald. 387. See *per* Best, J., p. 394.

[2] 5 B. & Ald. 557.

[3] The case of Hanson *v.* Armitage is also reported in 1 D. & Ry. 128. It is, because of the uncertain manner in which Abbott, C. J., and other judges of the Court of Queen's Bench at that time employed the word "acceptance," of less value than it otherwise would have been had they been more accurate. In this case they nominally hold that the "acceptance" of goods by a wharfinger bought by a verbal order was not "a sufficient acceptance" to make the purchaser liable within the 17th section of the statute. They say "Those words require an acceptance by the party himself, and we are of opinion that it will not be right to suffer any constructive acceptance to satisfy its provisions in the absence of proof of any express contract in writing." But the law is perfectly clear that generally where a constructive or symbolical receipt is good at common law, such a receipt meets the requirements of the "actual receipt" of the statute. What in their uncertain mode of using the term "acceptance" they mean by saying there can be no "constructive acceptance," it is impossible to say. It is equally impossible to say whether in Hanson *v.* Armitage, they meant that the receipt by the wharfinger did not amount to an acceptance by

Carter *v.* Toussaint[1] is another case where, in a very marked way, the terms "acceptance" and "actual receipt" are confounded; Holroyd, J., expressly saying, "The facts here stated do not amount to *an acceptance or actual receipt;*" very improperly confounding these terms. So, the reporter's note is that there had been "no acceptance." The "acceptance," within the meaning of the statute, is perfectly clear. What the case really holds is, that there had been no actual receipt of the horse, which was the subject of the parol sale. This is all that is meant even by Bayley, J., when he says: "By the seventeenth section it is provided, that in the case of a sale of goods above the value of £10, the buyer must accept, and actually receive part of the goods so sold. *There can be no acceptance or actual receipt by the buyer, unless there be a change of possession;* and unless the seller divest himself *of the possession of the goods*, though but for a moment, the property remains in him. Here, the plaintiffs had a lien on the horse, and were not compellable to part with possession till the price was paid."

This is very improperly treating the terms "accept *and* actually receive," as though they meant no more than "receive and actually receive." Though such language is unfortunate, all that the case holds is, that there had been no actual transmission of the possession of the horse from the vendor to the vendee, and, therefore, no actual receipt by the vendee, in either of the modes recognized by the common law, — manual, constructive, or symbolical. But aside from the question of the actual receipt — reception — of the horse, there is no question in the case of its acceptance at all, as the accepting and taking to it as the subject of the contract. The whole question is discussed as to whether there had been an actual *delivery* of the horse or not; not as to whether there had been an acceptance of the horse within the meaning of the statute, apart from the actual receipt, which the statute also requires.

The facts were, that the plaintiffs, who were farriers, sold to the defendants *a specific race-horse*, by a verbal contract, for £30. The horse, at the time of the sale, required to be fired, which was done with the approbation of the defendant and in his presence;

the purchaser, or did not amount to an actual receipt by him. The case is usually improperly cited, to show that there may be the actual receipt by a wharfinger or carrier required by the statute, but that such parties are not agents to accept. Benj. on Sales, § 160. And see Blackb. on Sales, 2d ed. 22; Campb. on Sales, 169. But the case, on the subject, like those others by the same judges, is authority for little more than that in such cases there have not been the acceptance *and* the actual receipt required by the statute, the presumption being that here by "no acceptance" they mean no actual receipt, as clearly there was no actual receipt by the vendee.

[1] 5 B. & Ald. 855.

and it was agreed that the horse should be kept by the plaintiffs for twenty days, without any charge being made for it. At the expiration of the twenty days the horse was, by the defendant's directions, taken by a servant of the plaintiffs to Kimpton Park, for the purpose of being turned out to grass there. It was then entered in the name of one of the plaintiffs, which was also done by the directions of the defendant, who was anxious that it might not be known that he kept a race-horse. No time was specified in the bargain for the payment of the price. These facts very clearly show the accepting, recognising, approving, the taking to of the horse as the specific subject of the contract, apart from the further "actual receipt" that is required. But the court, notwithstanding their unfortunate confusion of terms, in effect, held, distinguishing the case from Elmore *v.* Stone,[1] that there had been no actual receipt (that is, no receipt, either manual, constructive, or symbolical), because there had been no manual, constructive, or symbolical act of delivery of the horse, which still remained in the plaintiffs' own possession, in their own name, unpaid for.

There may be an accepting of the subject of the sale, without the actual receipt of it. But clearly there can be no actual receipt of it, where there has been no change in the possession, manual, symbolical, or constructive. Hence, as to the actual receipt required, it was correctly said by Bayley, J.: "How can it be said that the horse was in the possession of the defendant, when he had no right to compel a delivery to him? For he could not, on tendering the keep, maintain trover against the park-keeper, because the possession had not passed from the vendors to him." Therefore, there was no "actual receipt" in him. So Abbott, C. J.: "It is quite clear, that the present plaintiffs kept possession of the horse as owners until it was sent to Kimpton Park. If, indeed, it had been sent there and entered in the defendant's name by his directions, I should have thought it would have amounted to an acceptance [meaning here "actual receipt"] by him. But here it was entered in the plaintiffs' name, and the plaintiffs' character of owner remained unchanged from first to last, and they could not have been compelled to deliver it without the payment of the money.[2] There was then no sufficient *acceptance* to take the case

[1] 1 Taunt. 458.

[2] As there had been no actual receipt under the statute, an action for the non-delivery of the horse could not have been sustained, even had there been a tender of payment, the vendors, where there had been no actual receipt of part of the goods, having the right at their election to refuse the payment, there being no "good" contract within the statute. If on tender of the price they were compellable to part with the possession of the goods, then the title would have been in the vendee, even though the possession remained in the vendor. And if there had been an "actual receipt" by the vendee, so that the property in the horse had passed under the statute to the vendee, the actual

out of the Statute of Frauds; and consequently the action is not maintainable." Here, palpably, is meant that there had been no transmission of the subject of the sale by an actual receipt by the purchaser; hence, no "actual receipt" under the statute, leaving actually the question of "acceptance" undisposed of. But, as we see later in this Part, a purchase of specific goods is itself an acceptance within the statute.

In Price *v.* Lea,[1] the defendant ordered a cask of cream of tartar, and offered to purchase two chests of lac dye, at a certain price. The traveller said the price proposed was below his limits, but he would write to his principals, and if the defendant did not receive a letter in one or two days, refusing to execute the order, he might conclude that his offer was accepted. The plaintiffs did not write to the defendant, but sent him both the cream of tartar and the lac dye. The defendant received the former and refused the latter. In an action for goods sold and delivered, the court held that as there was not one entire contract for both the articles; the "acceptance" of one was not the acceptance of the other. This is unquestionably correct, in whatever sense they used the term "acceptance;" *i. e.*, that the acceptance or actual receipt of one article is not that of another, unless there is one entire contract for both.[2]

A very slight approach was made in Baldey *v.* Parker[3] towards an appreciation of the "accepting" of the statute, apart from the "actual receipt" also there required. The plaintiffs were linen-drapers, and the defendant came to their shop and bargained for various articles. A separate price was agreed upon for each, and no one article was of the value of £10; though the whole of them was much in excess of that sum. Some of the goods were measured in the defendant's presence; some he marked with a pencil; others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. Subsequently, when the goods were sent to his house, he refused to "receive" them. The court held that the contract for the different articles was an entire contract, within the statute, but that there had been no actual receipt of part of the goods. Abbott, C. J.,

or constructive possession of the horse being in the vendee, the vendor's lien would have been gone, as in Elmore *v.* Stone, 1 Taunt. 458, the possession of the vendor being that merely of a custodian or bailee, — his possession in that capacity being the possession of the owner, the vendee. There is a good deal of confusion in the text-books and cases on the question of the vendor's lien in cases of actual receipt under the statute, which we shall endeavor to remove when we more immediately consider that subject *infra*.

[1] 1 B. & C. 156.

[2] See Hodgson *v.* LeBret, 1 Camp. 233; Rohde *v.* Thwaites, 6 B. & C. 388; Elliott *v.* Thomas, 3 M. & W. 170; Scott *v.* The Eastern Counties Ry. Co., 12 M. & W. 33; Bigg *v.* Whisking, 14 C. B. 195; Baldey *v.* Parker, 2 B. & C. 37; Thompson *v.* Maceroni, 3 B. & C. 1.

[3] 2 B. & C. 37.

after citing the statute, referring to the language in it, said: "It would be difficult to find words [*i. e.* than those in the statute] more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer." And Bayley, J.: "The buyer cannot be considered to have actually received the goods when they had remained from the first to the last in the possession of the seller." And Holroyd, J.: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien." And, for the plaintiffs, it was claimed, that the accepting was an act done "to show an approval of the contract." But throughout the judgments, the terms "acceptance" and "accepting," are used as though, in their application to the statute, they were synonymous with reception and receiving;[1] Holroyd, J., further saying: "The statute contemplates such a parting with the possession; and, therefore, as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them [treating these words as synonymous] as his own, within the meaning of the statute." Within the meaning of the word "accept," in the statute, the vendee may accept the goods without the vendor parting with either his possession or his lien; and it is also equally clear that, under the statute, the vendee may accept and actually receive a part of the goods sold, and the vendor still retain his lien on the undelivered part, — as he may, on the whole, where there has been a part-payment or a memorandum in writing of the contract, unaccompanied by a transfer of the possession. We consider this, however, further on. In Baldey *v.* Parker,[2] it was clear that however good the accepting of the goods was, under the statute, there had been no actual receipt of them by the vendee. And this is really what the case holds, although the reporter's note states that it also holds that there was no acceptance of any part of the goods.[3]

[1] See remarks of Blackburn, J., on this case in Cusick *v.* Robinson, 1 B. & S. 299, at p. 308, stated by us *infra*.

[2] 2 B. & C. 37.

[3] In Phillips *v.* Bistolli, 2 B. & C. 511, and Bartall *v.* Burn, 3 B. & C. 423, the term "actual acceptance" is used when "actual receipt" is clearly meant. So, in Nicholle *v.* Plume, 1 C. & P. 272, the court say "there must be an unequivocal acceptance," meaning an "unequivocal" receipt; to which the reporter added: "The court won't allow a *constructive* acceptance to be sufficient." It is difficult to say what is meant by this, as a *constructive* receipt is unquestionably good. It is simply an error of the reporter, as the court did not use the term. In Proctor *v.* Jones, 2 C. & P. 532, it was held by Best, C. J., that a transfer in the dock-books is a symbolical delivery. More properly, it is a *constructive* delivery; the delivery of a symbol, such, for instance, as the key of the warehouse where the goods are kept, being a *symbolical* delivery. But if a constructive or symbolical delivery, that, of course, implies a constructive or symbolical receipt. So, too, as to the acceptance of the statute, it may be express or implied. Virtually, then, it may be actual or constructive (words which, in this connection, are, in effect, interchangeable with "express" or "implied"), as well as regards the acceptance as the actual receipt of the statute.

Although many of these cases are of less value in showing what is an acceptance, from the uncertain way in which the judges used the terms, accept, acceptance, accepting; yet, independent of the actual receipt, it would seem to have been held by Best, C. J., in Proctor *v.* Jones,[1] where the marking by the vendor of casks of wine lying in the docks, with the initials of the purchaser, at his request, and in his presence, the terms of payment not having been settled at the time, and consequently the contract not being complete, is not an acceptance under the seventeenth section of the statute. But, we think, had these acts, including the subsequent agreement as to the terms of payment, been followed by an actual receipt of the goods, there would have been both the acceptance and actual receipt required by the statute; there being, in fact, no complete contract in such cases under the statute, until both of these concur.

A verbal sale was made in Rohde *v.* Thwaites,[2] of twenty hogsheads of sugar at 56*s.* 6*d.* per cwt.; the sugar at the time being in bulk. The sugar was to be paid for in two months then following. Four hogsheads of the sugar were filled up; and were accepted and received by the purchaser. Subsequently, the remaining sixteen hogsheads were separated from the bulk, and the defendant, being required to take them away, said he would as soon as he could. The court held that this was an appropriation of the sixteen hogsheads, made by the vendor and assented to by the vendee, and that the acceptance and actual receipt of the four hogsheads took the contract out of the statute with respect to the whole.[3]

The case of Smith . Surman [4] would be a valuable case, as well on the question of acceptance as on that of actual receipt, but for the confusion existing in that and in so many other of the English cases with reference to these two terms of the statute; the two terms, "accept" and "actually receive," being treated, as we have before intimated, as though they were synonymous, or were, in effect, "receive" *and* "actually receive;" making of the language of the statute what seems to us to be pure nonsense.

In several of the early cases, such as Chaplin *v.* Rogers,[5] Elmore *v.* Stone,[6] Astey *v.* Emery,[7] Blenkinsop *v.* Clayton,[8] and Tempest *v.* Fitzgerald,[9] the question which arose was as to the

[1] 2 C. & P. 532.
[2] 6 B. & C. 388.
[3] But where a party to whom goods to the amount of £10 and upwards were delivered, subject to approval, under a verbal order, it was held that he must refuse to accept them in a reasonable time, and if he do not, he is to be treated as having accepted them. Coleman *v.* Gibson, 1 Moo. & Rob. 168.
[4] 9 B. & C. 561.
[5] 1 East, 192.
[6] 1 Taunt. 458.
[7] 6 M. & S. 262.
[8] 7 Taunt. 597.
[9] 3 B. & Ald. 680

actual receipt. "In all these cases," as Blackburn in his work on Sales[1] well says, with reference to some of these and similar cases, "there seems to have been ample evidence of *an acceptance of the goods, but scanty evidence of any actual receipt*, if by that is to be understood a taking of possession."

The necessity, therefore, in these cases, not having arisen for the consideration of the meaning of the words, "accept *and* actually receive," in the statute, the courts seem to have fallen into the careless habit — apparently, but not really, following the preceding cases — of entirely ignoring the word "accept," in the statute, or of treating it as meaning nothing more than receive. Yet as far back as Kent *v.* Huskinson[2] (A. D. 1802), where there had been an actual receipt of the goods purchased, but no "*acceptance*" of them, and it was claimed that the actual receipt of the goods by the vendee, and his opening the bale and subjecting it to an examination, was an acceptance of the goods, the *contra* was expressly held. In this contention, the words of the statute were misquoted, so as to accord with very many of the more recent English decisions on the subject, — "except the buyer shall accept part of the goods so sold, *or* actually receive the same." In this case, there having been no previous acceptance of the goods, after their actual receipt and examination by the defendant, he *rejected* them and sent them back. The court very properly held that there had been no "acceptance" of the goods; plainly using the term in the sense in which it is employed in the statute. Thus, Heath, J., says: "According to the words of the statute, the exception does not apply, *unless the vendee both receive and accept*. Now that acceptance I cannot consider to be any other than the ultimate acceptance, and such as completely affirms the contract." And Chambre, J.: "Certainly, there was no acceptance of the goods by the defendant unless we can consider a *refusal to accept* as amounting to an acceptance." And yet, in this case, there was no question whatever as to the "actual receipt" of the goods. So, if "accept and actually receive" meant merely "receive and actually receive," there was here the receipt and actual receipt, — the receipt in this case being neither symbolical nor constructive, but manual, actual.

On principle, no less than as a deduction from the well-decided case of Kent *v.* Huskinson,[3] it may be said: Under the statute goods may be received by the purchaser; but where there has been no previous acceptance of them he may reject them; that is, *refuse to accept them.* Where, therefore, there is this right of

[1] 2d ed. 29.
[2] 3 B. & P. 233, stated *supra*, p. 321.
[3] 3 B. & P. 233.

rejection, even though there have been an actual receipt, on the due exercise of this right of rejection there is no acceptance within the statute. Where there has been the acceptance, as well as the receipt, there is no longer a right of rejection. And where there has been an acceptance, but no receipt, as without the concurrence of both acceptance and receipt there is no "good" contract, the inchoate vendor is not bound to deliver, nor the inchoate vendee bound to *receive*, the "accepted" goods, notwithstanding their previous acceptance. The right to reject is the converse of the acceptance; the refusal to deliver or receive the converse of the actual receipt. And yet there are scores of English cases which entirely ignore these important distinctions. In fact, we know of no branch of law, even including partnership, prior to the decision of Cox *v.* Hickman,[1] in which there are so many English decisions so utterly unsound as there are on questions connected with this subject.

Returning to Smith *v.* Surman[2] (A. D. 1829), we find this case tinctured with the error running through so many of the previous cases we have examined. In this case A., being the owner of trees growing on his land, verbally agreed with B., while they were standing, to sell him the timber at an agreed price *per* foot. A. gave orders to have the trees cut down, and B., while the trees were in the course of being cut, and after two of them had been actually felled, came to the coppice, and A. pointed out to him the trees, which were numbered. B., after he had looked at them, said to one of the by-standers that he had made a good bargain, and told one of the persons who was cutting them to tell the other men to cross-cut them fair, and they were cut accordingly. After the trees had been measured B. met the person who had measured them, and asked him if he had measured the timber at A.'s, and receiving an answer in the affirmative B. offered to sell him the butts (which he alleged he had bought of A.); but this not being acceded to, the defendant asked him if he knew any person who wanted any butts, and then he would go to A.'s and convert the tops into building stuff. B. having refused to take away the timber, special assumpsit was brought against him for refusing to fetch and carry away the timber, or to pay for the same, with counts for goods bargained and sold and goods sold and delivered. In this case, there having been a sale at an agreed price of specific, ascertained goods, the facts here showed just as complete an acceptance of the goods, as the very subject of the contract, as in the different cases examined by us, *supra*;[3] with

[1] 8 H. L. Cas. 268.
[2] 9 B. & C. 561.
[3] See *ante*, 324 *et seq.*

reference to which, as we have seen, one of the very highest authorities on the subject in England or elsewhere has expressed the opinion that the evidence in them of such acceptance was ample.[1]

The question really in the case was whether there had been an actual receipt of any part of the goods sold. And as, notwithstanding the acceptance of the specific goods as the express subject of the contract, there was no delivery of the goods or any part of them, either manual, constructive, or symbolical, and no greater dealing with the goods from which a receipt could be implied than there was in Blenkinsop *v.* Clayton,[2] it was obvious that there was no actual receipt of the goods or any part thereof to take the case out of the statute. But, again confounding the words "accept" and "actual receipt," as though "accept" was mere surplusage, the contention was that there had been an "actual acceptance," meaning simply an actual receipt within the exception of the statute, the reporter deducing from the case "that there had been no part acceptance or actual receipt of the goods to satisfy the statute."[3]

[1] Blackburn on Sales, 2d ed. 29. See Marshall *v.* Green, 1 C. P. Div. 35, stated towards the close of the next Part, which in most of its facts was a very similar case to that of Smith *v.* Surman, 9 B. & C., 561; but it differed essentially from this latter case in the respect that although in both there was a sale and purchase of specific, ascertained goods, constituting a clear acceptance of the subject of the sale in each case, yet in Marshall *v.* Green the trees, the subject of the sale there, as in Smith *v.* Surman, were under the contract to be felled, and actually were felled, by the vendee, constituting an actual receipt of them, which was wanting in the otherwise similar case of Smith *v.* Surman.

[2] 7 Taunt. 597.

[3] In the judgment of Bayley, J., although the terms "acceptance or actual receipt" are wrongly used as convertible terms, and "acceptance" and "actual acceptance" most carelessly and improperly used, where he should have employed receipt or actual receipt, yet the whole gist of his reasoning is that there had been no change in the possession; that is, no actual receipt by the vendee, such as was implied in Chaplin *v.* Rogers, 1 East, 194, and as arose constructively in what we think, notwithstanding the doubts cast upon it in some of the cases, is the well-decided case of Elmore *v.* Stone, 1 Taunt. 458, stated, *supra*, p. 324. Bayley, J., says: "The question is whether there was any acceptance or actual receipt [!] of part of the property sold, so as to bring the case within the exception in the 17th section; and I think that there was no such acceptance or actual receipt [?]. In all the cases cited there has been something equivalent to an *acceptance* [!]. In Chaplin *v.* Rogers, 1 East, 194, the vendee had sold the hay again, and the jury from thence drew the conclusion that there had been *an actual acceptance* [!]. In Elmore *v.* Stone, 1 Taunt. 458, the horses were purchased of a horse-dealer who kept a livery stable. The buyer directed the seller to keep the horses at livery, and they were transferred from the sale to the livery stable. The purchaser became liable to the livery-stable keeper for the keep, which could not have been the case unless the horses were supposed to have *gone into his possession*. The direction given by the vendee was considered equivalent to an acceptance *or* actual receipt [here clearly treating these terms improperly as convertible] of the horses. The vendor was converted into the agent of the vendee for the keep of the horses, and they might be considered *as much in the possession of the vendee as if they had been in his own stable*." All this should have been expressly limited to the question of the sufficiency of the receipt to meet the "actual receipt" required by the statute. It is to such cases as this that one of the very best of American law-writers (Browne on Statute of Frauds, 316 *a*) refers when he speaks of the habit

Maberley *v.* Sheppard [1] was an action for the price of a waggon as for goods sold and delivered. The marginal note of this case is: "Defendant employed plaintiff to construct a waggon, and while the vehicle was in the plaintiff's yard, unfinished, procured a third person to fix on the iron work and a tilt. Held, that this did not constitute *an acceptance* under the Statute of Frauds, § 17." All of these cases are cited in the English digests as though they really held that there had been no acceptance. The question actually decided in Maberley *v.* Sheppard does not touch the question of acceptance, under the statute, at all. What it does hold is that no actual receipt of the waggon was to be implied from the acts done by the defendant, although the usual misuse of the statutory word "accept" is found in this as in so many of the other English cases. Tindal, C. J.'s whole judgment shows that all he meant was that there had been no delivery and actual receipt of the waggon, although in this, as in so many others of the English cases, from their misconception of the statute, and their failure to give any effect to the word "accept," except so far as the meaning of that word is covered by the words "actually receive," it is not singular that so many of these cases are misstated by the reporters and others.[2]

then prevalent in the English cases of improperly using the terms acceptance, receipt, and delivery, as though they were synonymous and interchangeable, rendering it necessary to carefully consider the meaning of the courts in so using these terms. The same very accurate authority on the subject correctly says: "To constitute *acceptance* there must be some conduct of the buyer in respect to the goods as affords evidence that he has identified and recognized them as the goods which were to be his by virtue of the alleged contract." Browne on Statute of Frauds, § 316 *b*. That is, accepting is the approving, the recognizing, the affirmation as an act of the mind of the particular subject as the subject of the contract actually made with respect to it. The same careless confounding of the terms "accept" and "actually receive" exists in the very latest of the English cases.

[1] 10 Bing. 99.

[2] Tindal, C. J., in delivering the judgment of the court, shows that the waggon was not finished, and was not capable of being delivered, and that the acts showing the acting as owner by the vendee, resulting from an assumed delivery, were not similar to those in Chaplin *v.* Rogers, 1 East, 192, where there was a re-sale by the vendee of the subject of the contract. The following renders it clear that when he uses the terms "actual acceptance," "actual delivery," and "actual receiving," Tindal, C. J., merely meant that there had been no "actual receipt" by the defendant, entirely apart from the question of accepting, under the statute, which latter point he does not touch at all. He says: "There are decisions which go to the length of holding, that as long as the vendor retains his right of lien over the whole of the commodity sold, there has been no such delivery and *acceptance* [used here as the complement of delivery, *receipt*. It is, of course, well-established law that an acceptance, under the statute, even of the whole, does not destroy the lien, while the goods remain in the actual possession of the vendor, without an 'actual receipt,' manual, constructive, or symbolical, by the vendee] as the statute intended." And, again, that "unless there has been a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and an actual acceptance by the latter, with an intention of taking possession as owner [here again simply meaning that there must be an actual delivery and receipt], the statute is not satisfied (see Baldey *v.* Parker, 2 B. & C. 44, and Phillips *v.* Bistolli, 2 B. & C. 511); and, undoubtedly, the present case cannot be held to fall within the compass of either of those de-

Accebal *v.* Levy [1] was a contract for 1000 barrels of nuts, where there was no sufficient note of the contract in writing. It was held that there having been no acceptance by the vendee abroad, of the nuts, so as to take them, as the subject of the contract, the delivery of them abroad, on board a ship chartered by him, was not an acceptance of them that would satisfy the statute. Here, as there was apparently a delivery to the vendee, on his own ship, had there been such an acceptance of the very subject of the contract by the vendee as would have precluded him from taking any objection to the quality of the goods sold, the statute would seem to have been satisfied.

In Elliott *v.* Pybus,[2] there was a part-payment which was sufficient to take the case out of the statute; but the case is still applicable both as to the acceptance and actual receipt. The action was assumpsit for goods bargained and sold. The defendant ordered the plaintiff to make a ruling machine, according to a plan of defendant, and deposited £4 towards the payment. The defendant from time to time superintended the construction of the machine; and before it was finished, an alteration was made in its construction at his request. When it was complete, he saw it and paid £2 more on account, but omitted to come to a final settlement. The plaintiff, thereupon, sent to him to fetch the machine away and pay the balance of the price. The defendant admitted that the machine was made according to his order, but requested the plaintiff to send it home before it was paid for. Here there was the acceptance of the machine by the defendant, as the subject of the contract. And the court held that, according to the rule of Rohde *v.* Thwaites,[3] and Atkinson *v.* Bell,[4] there had been such an appropriation of the machine by the vendor, assented to by the vendee, as would pass the property to the latter, which a jury or a court having cognizance of the facts would be warranted in finding.

An action was brought in Baines *v.* Jevons,[5] for the price of an

cisions; for the plaintiff retained his lien upon the waggon, and there was nothing in the facts that denoted any intention either to deliver or accept. [Here again meaning the correlative of deliver, receive]. The circumstances of this case certainly leave it open to doubt whether the statute has been complied with or not; but we think it is the duty of the plaintiff to free the case from all doubt, and where any remains, that it is safer to adhere to the plain, intelligible words of the statute, which point as clearly as words can [To what? — an acceptance *and* an actual receipt? No; but] to an *actual delivery* and *an actual receiving* (*sic*) of part or the whole of the goods sold. Upon *this ground* [entirely dispensing with the consideration of the acceptance under the statute, also required] we hold that, in the present case, the requisites of the statute have not been complied with, and that the rule for setting aside the nonsuit and entering a verdict for plaintiff must be discharged."

[1] 10 Bing. 376.
[2] 10 Bing. 512.
[3] 6 B. & C. 388, stated *supra*, 336.
[4] 8 B. & C. 277.
[5] 7 C. & P. 288.

engine, as for goods sold and delivered. In the statement of the case, and in the summing up by the judge (Alderson, B.), the question is treated simply as whether there was an "*acceptance*" of the engine; no reference being made to the question of the actual receipt at all; although, in the pleadings, the language of the statute is properly and strictly followed. All of these cases are improperly treated by Benjamin, as questions of "constructive acceptance."[1] In the case it appeared that the defendant had bought of the plaintiff a fire-engine, at the price of £25, there being no note in writing of the contract, nor any part payment. To sustain the replication to the plea, "that the defendant did accept, *and* actually received the said goods," a witness was called who stated that the defendant took him into a yard where the fire-engine stood, to show it to him; and that, on his asking the defendant what he meant to do with it, as no one would want it, the defendant replied that the parish of Dudley would want an engine, as well as two other persons whom he named. It was also proved that, on another person asking the defendant what he meant to do with it, he replied, "I know what I am going to do with it;" and to another (a Mr. Neal), who asked if the plaintiff would sell the engine, the defendant said: "Never mind that, I have a concern in that engine." Here was the clearest possible evidence of *acceptance;* but extremely slight and doubtful evidence — or, in fact, no evidence whatever — of the *actual receipt* required by the statute. The evidence admitting no question as to the acceptance of the engine, the actual effect of Alderson, B.'s summing up,[2] was, that if there had been such a dealing with the fire-engine, by the defendant, as convinced the jury that he had treated it as his own, an actual receipt would be implied.[3] It is most unfortunate that, in so many of these cases, there is such inextricable confusion in terms, leading to the greatest doubt as to what is meant, and leaving the cases of relatively little value. In this case, as the action was for goods sold and delivered, the

[1] Benj. on Sales, §§ 144, 145 *et seq.*

[2] The language of Alderson, B., was: "The question here is, whether the defendant has *accepted* this fire-engine. We find that the defendant takes a person to look at it, and says who is likely to want it. You will say whether that is not a dealing with it as his own; and when another witness asks him what he is going to do with it, the defendant does not say that it is not his; but he replies, 'I know what I am going to do with it.' And in his observations to Mr. Neal, he speaks as if it were his own. You will consider whether this convinces you that the defendant treated this fire-engine as his own, and dealt with it as such; for, if so, the plaintiff is entitled to a verdict."

[3] On this point the case goes much farther than such cases as Tempest *v.* Fitzgerald, 3 B. & Ald. 680; Carter *v.* Toussaint, 5 B. & Ald. 855; Kent *v.* Huskinson, 3 B. & P. 233; or even than Blenkinsop *v.* Clayton, 7 Taunt. 597, and Chaplin *v.* Rogers, 1 East, 192, stated by us, *supra*, p. 321 *et seq.* We examine the question of constructive receipts more particularly in the next succeeding Part. In Baines *v.* Jevons, 7 C. & P. 288, while there was evidence of acceptance, the actual receipt was entirely wanting.

very essence of the action involved the necessity of showing a delivery and "actual receipt;" of which there was no evidence whatever.

We find, at length, at least indications of a kind of distinction being taken, by Parke, B., in Johnson *v.* Dodgson,[1] between the acceptance *and* actual receipt required by the statute to make the contract "good," which was alluded to by Heath, J. (A. D. 1802), in Kent *v.* Huskinson,[2] and which has been lost sight of in so many of the English cases since that time. In Johnson *v.* Dodgson, where it seems to have been held that there had been no acceptance by the purchaser, under a verbal contract, of any part of the goods sold, it was claimed that the subsequent delivery for the vendee, to a carrier, of bulk samples, which were a part of the goods purchased, was an "acceptance" by the vendee. Counsel said: "But there is a further question, whether there has not been an acceptance of the goods by the defendant. If the bulk answered the samples (as the jury have found), the delivery of the bulk samples to the carrier would be a complete delivery of the hops." Parke, B.: "How can you say there was an acceptance when the defendant expressly says he will not accept? *The delivery to the carrier may be a* DELIVERY *to the defendant, but the acceptance of the carrier is not an* ACCEPTANCE *by him.* The old cases in which it has been said that a *receipt* by a carrier was an *acceptance to satisfy the statute*, were overruled by Howe *v.* Palmer,[3] and Hanson *v.* Armitage."[4] And Lord Abinger, C. B.: "If, to take the strongest case, the purchaser sent his own servant for the goods, and when they were brought, sent them back, *as not answering the contract*, he could not be said to *accept* them." But, in this case, if there had been the prior acceptance under the statute, by the master, the receipt by the servant would have been a receipt by the master to have answered the requirements of the "actual receipt" of the statute.[5] And what an acceptance under the statute is, was not clearly considered in this case.

[1] 2 M. & W. 653, 656.

[2] 3 B. & P. 233, 235. "According to the words of the statute, the exception does not apply *unless the vendee both receive and accept.*"

[3] 2 B. & Ald. 321.

[4] 5 B. & Ald. 559.

[5] So, in the preceding case of Boulter *v.* Arnott, 1 Cr. & M. 333, which was an action for goods sold and delivered, the goods were packed in the defendant's boxes by the plaintiff for the defendant, and in his presence, who requested the plaintiff to keep them for him until he called for them, this unquestionably amounting to an acceptance of the goods within the meaning of the statute; but the court held that this was no delivery — the complement of receipt — to the defendant. Bayley, B., said: "From first to last those goods remained in the possession of the plaintiff. It is an entirely different question whether doing an act like marking or packing for the vendee in his presence may not operate as an acceptance [*i.* receipt] by him under the statute of frauds. The question here is, whether there was a delivery to the vendee. I do not agree that the boxes are to be considered as having been the warehouse of

The case of Johnson *v.* Dodgson [1] was really decided on the ground that there was a sufficient memorandum in writing to take the case out of the statute. But as it was a purchase of goods by sample, the jury finding that the bulk corresponded with the sample, and the action for the price being sustained, it seems clear that there was sufficient evidence of the acceptance to satisfy the statute, outside of the question of the actual receipt, which, under that clause of the statute, is also required to make the contract be deemed good. We find the case also reported in 1 Jur. 312, 739. It does not clearly appear from either of the reports, but, as the action was for goods sold and delivered, and was sustained, and as the jury found that the "bulk" of the goods answered the samples, it seems as though the whole of the goods purchased were delivered to the defendant's agent, and that, therefore, there were both the acceptance and actual receipt of the goods to satisfy the statute. However, from the uncertain manner in which the facts of the case appear in the reports, and from the fact that the case went off on another point, it is of little value on the questions of the acceptance and actual receipt of the statute.

In Elliott *v.* Thomas,[2] there was a sale under a verbal order of two kinds of steel; common steel and cast steel. There was an *actual receipt of the whole;* but it was claimed that, although there was an *acceptance* of the common steel, although both were the subject of one entire order, this was not an acceptance within the meaning of the statute of the cast steel. In this case the clear discrimination was made between the actual receipt and the accepting of the statute. Counsel[3] said: Even su sing goods ordered by parol to be furnished pursuant to order, the buyer is not bound to take them, the contract being, *per se*, inoperative by the Statute of Frauds. On the other hand, whether they answer the order or not, if the buyer agree *to take to the goods actually supplied*, he is precluded from saying that there was no acceptance. The first question, therefore, is, whether the acceptance of the common steel operated as an acceptance of the cast steel also. It is submitted that the part-acceptance meant by the statute, is the part-acceptance of one entire thing of the same character. So

the defendant; but I think that the plaintiff was entitled to consider the goods in his own possession." And in Goodall *v.* Skelton, 2 H. Bl. 316, there was a clear acceptance of the goods, but no delivery or receipt of them. There A. agreed to sell goods to B., who so far accepted the goods that he paid earnest for them to bind the bargain; and the goods were packed in cloths furnished by B., and deposited in a building belonging to A. until B. should send for them; but A. declared that they should not be carried away until they were paid for; and it was held, in an action for goods sold and delivered, that there was no delivery. In these cases there was the clear acceptance, but not the actual receipt.

[1] 2 M. & W. 653.

[2] 3 M. & W. 170.

[3] Cresswell, subsequently Cresswell, J.

that *the taking to one part* is necessarily a taking to the rest. A *delivery* of part never amounts to a delivery of the whole, unless the parties appear to have so intended it. It cannot be said there was an acceptance of the whole. The court held that there was one entire contract for both kinds of the steel, and that the "acceptance" of the common steel (there having been an actual receipt of both kinds) was sufficient to take the case out of the statute as to the cast steel also.

So, in Jordan *v.* Norton,[1] which was an action for goods sold and delivered. There there was a *receipt* by the defendant of the subject of the sale; but as there was no *acceptance*, it was held that the action would not lie. Had there been an acceptance of the subject of the sale, its receipt and retention would have been sufficient to have sustained the action.[2]

Wright *v.* Percival[3] was an action on a special contract for "not accepting"[4] a carriage, with a count for goods sold and

[1] 4 M. & W. 155.

[2] In this case there was no acceptance, because although the subject of the sale was agreed on, the minds of the parties had not met on the terms of the sale, and hence there was no acceptance of any part of the goods *sold*, as there was, in fact, neither sale nor acceptance. And see Bill *v.* Bament, 9 M. & W. 36; Knight *v.* Mann, 118 Mass. 143, 145; Marsh *v.* Hyde, 3 Gray, 331.

[3] 8 L. J. N. S. Q. B. 258.

[4] Here, "not accepting" means as much not receiving as not accepting, and it is because the word "accept" has two very different meanings — one the equivalent of *receipt*, and the other rather that of *assent* — that so much confusion has arisen in connection with the subject, as we find in the text-books and cases. As we have shown, *supra*, the word in the statute is used in a sense different from that of receipt, and rather in the sense of assent or approbation. In Abbott's Law Dict. 7, it is thus defined: "ACCEPT. To receive with approval or satisfaction; to receive with intent to retain. The fact of acceptance, that is, assent, is important to be ascertained in determining the validity and obligation of various contracts. Thus, one to whom a contract is proposed, and who agrees to its terms, is said to accept the proposal; though, for this idea, assent is a more strictly accurate term." And 1 Burr. Law Dict. tit. "ACCEPTANCE:" "A receiving with approbation or satisfaction; or, in the language of the old books, 'a taking in good part.' *Termes de la ley.* Approval of, assent to, or acquiescence in a thing received, an agreement to keep a thing received." "With respect to the buyer, there must be an acceptance, and such as completely affirms the contract, though this acceptance need not be in express terms, but may arise constructively out of the acts of the vendee." Rob. on Frauds, 178. And Taylor on Evidence (7th Eng. ed. § 1045), though not, as we shall see in a later part of this work, altogether accurate with respect to the effect of the accepting and actual receipt of the statute upon either the necessary extinction, *in all cases*, of the vendor's lien, or the preclusion of the purchaser to object to the quantity or quality of the goods, is entirely accurate in the distinction which he makes between the acceptance and actual receipt, where he says: "The *acceptance* and *actual receipt* mentioned by the statute have given rise to much litigation; but, without entering into any lengthened discussion of the numerous decisions which bear on this point, it may suffice to observe, that each of the two terms has a distinct and separate meaning; that a compliance with both requisites is necessary to satisfy the statute; that an acceptance and receipt of part of the goods will be as operative as an acceptance and receipt of the whole; that in cases relating to the purchase of specific goods the acceptance may precede the receipt, as well as follow it or be contemporaneous with it; that an agent authorized to receive goods is not consequently authorized to accept them; that the receipt, which implies delivery, must be such as will preclude the vendor from retaining any lien on the goods, and that the acceptance and receipt together must be such as will preclude the purchaser from objecting to their quantity

delivered. The facts were that the defendant having agreed to buy a carriage of the plaintiffs, came, after it was finished, to the plaintiffs' manufactory, bringing with her a cover for the hind seat and a set of traces, which the carriage had been previously made to fit. One of the plaintiffs said the carriage was complete. The defendant and her sisters got into it, and said it was a very nice one. They then desired the plaintiffs to order a pair of post-horses to take the carriage home, stating that they would call at half-past four. They added that they brought a cover to put over the hind seat, and directed that it should be put over twice doubled. The cover was put over the hind seat in their presence, and agreeably to their directions. The afternoon proved wet, and at five o'clock the defendant and her sisters came to the plaintiffs, and stated their intention not to take the carriage home that night owing to the badness of the weather. The defendant afterwards refused to pay the price demanded by the plaintiffs, and did not take the carriage away. The jury found for the plaintiffs on the count for goods sold and delivered. The court held that there had been an acceptance and actual receipt of the carriage by the defendant to satisfy the statute, and sustained the verdict. Lord Denman, C. J., said, "The verdict was right on the question whether an action for goods sold and delivered could be maintained, for there was a complete delivery and acceptance. *Where a buyer has the full control over the goods in question, and the power of taking them away, the jury are fully justified in finding a complete delivery.*" So, Littledale, J.: "The question in this case is *whether a delivery was actually made.* I think it was, and that the defendant accepted the carriage by putting on the cover. Her intention, moreover, was to take it away, and she was prevented from doing so *only* by the unfavorable state of the weather. *She exercised an act of ownership,*

or quality. Indeed, the broad question, which must be submitted as one of fact to the jury, is whether the circumstances prove a delivery by the vendor, and an acceptance and actual receipt by the vendee, intended by both parties to have the effect of transferring the right of possession from the one to the other. The mere marking of goods, therefore, by the vendee in the vendor's shop, where they are to be paid for by ready money, will not suffice, as this act, though it may constitute a valid acceptance, is not such a receipt by the vendee as will deprive the vendor, even when he assents to it, of his right of lien." So, Camp. on Sales, 168: "Both acceptance and actual receipt must exist in order to satisfy the statute, and the order of time in which they occur is indifferent." So, in an admirable case on the subject in Michigan, Hewes *v.* Jordan, 39 Md. 472, which we state fully, *infra*, Alvey, J., in delivering the judgment, said: "The act of acceptance is not confined to any particular order of time in reference to the actual receipt of the goods. On the contrary, acceptance may precede, as in cases *where the vendee has inspected and approved the specific goods purchased*, as well as be contemporaneous with, or subsequent to, the actual receipt of the goods." The question in connection with the law of sales is so important, and the cases so numerous where the acceptance and actual receipt are improperly treated as synonymous, that we are anxious to make the matter perfectly clear. Hence our dwelling so fully upon it.

and it was for the jury to say whether there was a delivery or not." And Williams, J.: "Cases of this kind depend on their own peculiar circumstances. Here, the facts of the case show that *the plaintiffs gave and the defendant received possession of the carriage*, although, on account of the unfavorable weather, the latter did not take it away at the time. . . . In the present case *there was a complete delivery*."

It will be noticed, that, in this case, while there was a special count for not accepting the carriage, the jury found not on that, but on the common count for goods sold and delivered. And their verdict was sustained. Had they found on the special count in favor of the plaintiff, their verdict could not have been sustained, for the court expressly held that the carriage had been accepted and actually delivered and actually received; the transfer of the "possession of the carriage," as well as the property, being thereby fully made to the defendant, so that an action which would only lie where there had been an actual delivery and receipt — manual, constructive, or symbolical — for goods sold and delivered was sustained. This fully vindicates the views we have expressed in our comments [1] on what we think was the incorrect decision of Lord Ellenborough in Anderson *v.* Scot.[2]

But while we think the court in Wright *v.* Percival [3] were perfectly correct in their decision, in which Lord Ellenborough's *nisi prius* decision in Anderson *v.* Scot [4] (with which we strongly differed) was in effect clearly overruled, we think their *obiter dicta* on another point were as unsound and as entirely illogical as was the decision of Lord Ellenborough in Anderson *v.* Scot. It will be noticed by our statements of facts, and by our extracts from the judgments in Wright *v.* Percival, that the court held that an action for goods sold and delivered would lie; that the carriage in question had been accepted, actually delivered, and actually received, — so that the defendant had "full control" over the carriage, properly "exercised an act of ownership" over it, "received possession of the carriage," had the full right "to take it away," and "was prevented from doing so *only* by the unfavorable state of the weather," there having been "*a complete delivery*." Clearly, on these facts, an action for goods *sold and delivered* would well lie. And yet, although it was thus so emphatically held that there had been this actual and complete transmutation of both property and possession in and to the defendant, so that nothing but an action for goods "sold and delivered" would lie for the carriage, — the property and possession in which had become fully vested in the defendant, — Patteson, J., says, that if,

[1] *Supra*, p. 323.
[2] 1 Camp. 235, n.
[3] 8 L. J. N. S. Q. B. 258.
[4] 1 Camp. 235, n.

under these facts, he had put it to the jury that "there could have been no delivery because *the plaintiffs had not parted with their lien*, they had found a right verdict in spite of his misdirection" (meaning, thereby, that he was *wrong* in saying that, *as the lien continued*, there could have been no actual delivery and actual receipt). Lord Denman, C. J., thought it impossible Patteson, J., could have "used such language;" and although he held emphatically, as did all the other members of the court, that there was a complete acceptance, delivery, and receipt by the vendee, so that she had "full control over the goods in question, and the power of taking them away," the facts showing "that *the plaintiffs gave and the defendant received possession* of the carriage," yet, *extra judicially*, they held, notwithstanding all this, that the vendor's lien still continued, although both property and possession were in the vendee. Just as effectually, we think, as the vendor is unable to maintain an action against the vendee for not accepting goods, where the goods have been in whole accepted, actually delivered, and actually received; so, we think, where the whole of the goods have been accepted, actually delivered, and (correlatively) actually received, so that the statute is satisfied, and so that, the property and possession have passed to the vendee (as it was held they did in Wright *v.* Percival),[1] so that an action for not receiving the goods would have been improper, and an action for goods sold and *delivered* be sustained: there, we think, it is clear the lien is gone; and that if the vendor have so passed to the vendee the property and possession in the goods, even though the goods are subsequently detained in the custody of the vendor, his possession is simply that of the vendee, as custodian, and his right of lien is gone, — gone with the possession which he delivered to the vendee, — so that his adverse detention would be unlawful, justifying against him trover, or replevin, in its modern form, for the unlawful detaining.

Elmore *v.* Stone[2] is directly in point. There a count for the price of two horses, as for goods sold and delivered, was sustained, it being held that there had been an acceptance, actual delivery, and actual receipt, the property and possession having passed to the vendee. The horses (as the carriage, in Wright *v.* Percival),[3] after the transmutation of the property and possession in and to them had been made to the vendee, remained in the custody of the vendor; but, notwithstanding this, the court held, correctly beyond any doubt, that the possession was in the vendee.

[1] 8 L. J. N. S. Q. B. 258.
[2] 1 Taunt. 458, stated *supra*.
[3] 8 L. J. N. S. Q. B. 258.

and that the lien was gone, Lord Mansfield, C. J., in delivering the judgment, saying: "*Under many events it might appear hard if the plaintiff should not continue to have a lien upon the horses which were in his possession so long as the price remained unpaid;* but it was for him to consider that before he made his agreement. After he had assented to keep the horses at livery they would, on the decease of the plaintiff, have become general assets; and so, if he had become bankrupt, they would have gone to his assignees. *The defendant could not have retained them, although he had not received the price.*" We examine the subject fully in the next succeeding Part.

In Harris *v.* Matthews[1] there is the same uncertainty as to the effect of the decision, owing to the use of the term "delivery" in lieu of the "actual receipt" of the statute, and the use of the term "acceptance" in a manner which leaves it doubtful what meaning is attached by the court to that term, — whether strictly acceptance, in the sense in which it is used in the statute, or only the actual receipt. From the statement of facts in the case, and from some of the expressions in the judgment, the case is left in doubt whether, in fact, there was not a sale, and acceptance at the time of sale, of specific goods at an agreed price, and whether the only question open really was whether or not a delivery at the place named therefor by the vendee was an actual receipt by him. Thus, it was contended for the defendant that "there had been *no actual receipt*" of the goods sold, "within the usual meaning of the term; on the contrary, the defendant had never taken the goods which had been left at a public inn. . . . It was not proved that the innkeeper or his servant was the agent of the defendant; and *acceptance* by them was not an acceptance by the defendant." Here acceptance and actual receipt are confounded. So the court itself is as bad. Littledale, J., in delivering the judgment, says: "It appeared that the action was for the price of some clover-seed which was sold in Banbury Market at a price agreed upon, and the defendant directed it to be detained in the Plough Inn, which was the place where he was putting up, he being a carrier. There is no doubt but there was *a delivery* of the clover-seed; but the question is, whether there is a sufficient *acceptance* [*query*, receipt] under the Statute of Frauds. The cases that have been decided on the statute are somewhat contradictory. It was formerly thought that a delivery to an agent was sufficient to satisfy the statute. Of late years a different rule has been laid down, and in the case of Hanson *v.* Armitage[2] the rule was stated to be that no constructive acceptance [here meaning receipt]

[1] 3 Jur. 1192. [2] 5 B. & Ald. 557.

would satisfy the provisions of the statute so long as there was absence of proof of an express contract in writing. That was a case where the goods had been sent to a wharfinger to be forwarded; and here, if the clover-seed had been left at the Plough Inn to be forwarded, I should say that there had been an acceptance [*i. e.*, simply actual receipt] within the statute." In Hanson *v.* Armitage[1] the contention of counsel was that the buyer must not only accept but "*actually* receive" (the italics being his own), the contention apparently being that the acceptance or receipt (treated as synonymous) to be actual must be personal, and an "actual" manual receipt of the subject. And as far as anything definite can be inferred from the holding of the court, that, in effect, was what they meant, as Abbott, C. J., in delivering the judgment of the court, says: "The court are of opinion that the acceptance [treating it as synonymous with *actual* receipt], *not being by the party* himself, was not sufficient." Harris *v.* Matthews, therefore, like Hanson *v.* Armitage, is a very uncertain authority, either on the question of acceptance or actual receipt under the statute.[2]

The acceptance in Dodsley *v.* Varley[3] was clear. The defendant bought specific wool from the plaintiff, for the price of which this action was brought. The wool was, at the time of the sale, at the plaintiff's; the price was agreed upon, but the wool was not then weighed. It was removed by the defendant to the premises of a third person, which was the place of deposit for the defendant's wools, where he had it weighed with his other purchases of wools, and packed in his own sheeting; but, by the course of dealing, which was tantamount to an agreement between the parties, the wool was not to be removed by the defendant from its place of deposit to a distance until it was paid for. It was held that

[1] Stated *supra*.

[2] Where the buyer has accepted and actually received the goods, this, under the statute, makes the contract good as to both vendor and vendee, as does also the part payment or earnest-money of the statute; taking the case out of the statute equally as to the vendor and the vendee. This is a crucial test in many cases. Thus if there have been an acceptance and actual receipt of some part of the goods, or a payment of earnest or part payment, then the contract of sale is equally enforceable by the vendor and vendee. Thus tested, there are several of the English cases which have been assumed to have been well decided that will scarcely bear criticism.

Williams *v.* Burgess, 10 A. & E. 499, is a case on the question as to the entirety of the contract as affected by the statute of frauds. There the plaintiff entered into a parol agreement to sell a mare for £20, subject to the condition that, if it should prove to be in foal, defendant should, on receiving £12 from plaintiff, return it on request. Plaintiff delivered the mare and received £20. On its proving to be in foal he tendered to defendant £12, and requested him to return the mare, which defendant refused to do. It was held that the contract to return it on payment of £12 was not a distinct contract of sale, but one of the conditions of the original sale to defendant; and that the delivery of the mare to defendant took the whole agreement out of the statute of frauds, so as to enable plaintiff to sue defendant for the refusal to return it.

[3] 12 A. & E. 632.

the requirements of the statute had been met.[1] In this very plain case, too, of acceptance it was claimed by counsel that there had not been an acceptance, again using this term as the correlative of delivery, or as synonymous with receipt.[2] So, in Bill *v.* Bament,[3] acceptance is used as synonymous for receipt, Lord Abinger, C. B., saying: "In order to make it such an acceptance as to satisfy the statute, it should appear that there was a *delivery*. . . . For want of a *delivery* there was no sufficient *acceptance* of these goods;" the italics being his own. Actual receipt is not once named in the case, but throughout "delivery and acceptance" are treated as though they were correlative terms, it being, in effect, held that there cannot be such acceptance unless the owner has so parted with the possession as to be deprived of his lien, thereby clearly meaning the transfer of the possession by the actual receipt of the vendee. Independent of the insufficiency of the actual receipt in this case, the question of the acceptance itself is a matter of doubt, the minds of the parties not having met as to the terms of the contract. We think the facts in the case did not even show an acceptance by the defendant of the goods (for the price of which he was sued) under any "agreement" between the parties, as they differed essentially as to one important ingredient of the contract, the price of the goods.[4]

Again, in Edan *v.* Dudfield,[5] acceptance and actual receipt are

[1] We state this case more fully in the next succeeding Part on the questions of actual receipt and lien.

[2] In Fricker *v.* Thomlinson, 1 M. & G. 772, there is a *semble* by the reporter, founded on an expression of Maule, J., that there could be an acceptance and receipt after action brought to take the case out of the statute; but the court declined to so decide. As the statute declares that the contract shall not be "good" without the requisites there named, it is clear that there must be a good cause of action at the time the action was brought. In the same case it was virtually admitted (and see Barnett *v.* Glossop, 3 M. & W. 170; Johnson *v.* Dodgson, 2 M. & W. 653) that evidence of the contract being void, under the statute, could be given under the general issue. The reason of this is because the general issue is a denial that there is a contract; and, for the same reason, where there is no contract at the time of action there is nothing to sue on. Bill *v.* Bament, 9 M. & W. 36, is an express authority that there must be a good cause of action, under the statute of frauds, at the time of action. This is correct beyond question.

[3] 9 M. & W. 36.

[4] Endicott, J., says, in Knight *v.* Mann, 118 Mass. 143, 145: "The test whether there is a binding contract within the terms of the statute is, whether there was a receipt and acceptance *in pursuance of the previous agreement.*" And Bigelow, J., in Marsh *v.* Hyde, 3 Gray, 331: "Proof of the delivery of goods, *in pursuance of an agreement for their sale* previously made, will be as efficacious to secure parties against false swearing as if the delivery had accompanied the verbal contract. It is the fact of delivery *under and in pursuance of an agreement of sale*, not the time when the delivery is made, that the statute renders essential to the proof of a valid contract. . . . The test whether a contract is binding upon the parties under the statute of frauds is, whether the delivery and acceptance, whenever they took place, *were in pursuance* of a previous agreement. If the verbal contract is proved, and a delivery *in pursuance of it* is shown, the requisites of the statute are fulfilled." Hence, when there has not been an acceptance "pursuant to an agreement," the parties not being *ad idem*, there has been no such acceptance as will take the case out of the statute. See *ante*, p. 345, n. 2.

[5] 1 Q. B. 551.

treated as being the same. In this case the acceptance was beyond any doubt; the only question was whether the constructive receipt in the case meant the actual receipt of the statute. The facts were that, goods of the plaintiff being in defendant's hands for the purpose of being sold by defendant for the plaintiff, dedefendant told plaintiff that he, defendant, would take them himself at a price agreed on. Defendant afterwards sold them to a third party, and after that, in a written account current delivered to plaintiff, debited himself with the price of the goods. In an action for goods sold and delivered, the jury having found for the plaintiff, it was claimed that the statute requiring an actual receipt could not be satisfied in the case of one at the time of the bargain being possessed of the goods, inasmuch as that circumstance prevented them from being delivered to him, and actually received by him, in virtue of the sale. The reporter's note is that there was "evidence upon which a jury might infer, as against defendant, a contract for the sale of goods by plaintiff to defendant, and an *acceptance* by defendant under such contract." The reporter's note is warranted by the language incorrectly used by the court, but the *ratio decidendi* of the case is that there was a constructive receipt which met the requirements of the actual receipt of the statute.[1]

[1] In an American work (Wood on Stat. of Frauds, p. 575, § 311), Edan *v.* Dudfield, 1 Q. B. 551, is improperly cited as "a leading case" to show that there may be a *constructive acceptance* of goods under the statute. What the case really holds is, that there may be a *constructive receipt* which will be equivalent to the "actual" receipt required. It is more correctly cited by a very careful and able American writer to show that, under the facts, "there was proper evidence to go to the jury to warrant their finding a constructive delivery and receipt by the buyer." Browne on Stat. of Frauds, 4th ed., § 319 *b*. It is also cited by that most careful and able writer, Blackburn, to show that there was an actual receipt, not a constructive acceptance. Blackburn on Sales, 2d ed., 34. Benjamin, too, properly cites it to show what is an actual receipt, inserting the word "(receipt!)" in parenthesis, in lieu of the improper word "acceptance" of Lord Denman, C. J.

See Pettitt *v.* Mitchell, 4 M. & G. 819, where the term "delivery" was held to be open to different meanings. At p. 834 by counsel: "Inspection is not the same as delivery. A party would have a right to inspect before bidding; that would not be a delivery. The term *delivery* in the condition is synonymous with *taking away;* and that condition means that there must be payment before the goods are delivered to be taken away; but that does not exclude the previous right of inspection. There may be a delivery to inspect, quite distinct from a delivery to take away. In the former case no property would pass. If a man goes into a shop and asks to look at an article, and the shopkeeper *delivers* it to him to look at, and he runs off with it, that would be a felony. [Tindal, C. J. There is no doubt of that.] Or if a party bids at an auction, without any intention to pay, and the thing he has bid for is delivered to him, and he takes it away, it is submitted that that also would be felony. [Tindal, C. J. Perhaps it would; but that does not appear to advance the argument.] It shows that the phrase 'delivery' may be used in different senses." In the same way the word "accept" of the statute means the receiving with assent or approval as the subject of the contract, not the "actual receipt," in the sense of receiving with the absolute control of the property, as owner. That is covered by "actual receipt" itself; not by the previous word "accept," with its more limited meaning. Here, again, obviously, the word "receiving" has, like "acceptance" and "delivery," different meanings.

But for the confusion in the English courts, particularly in the Court of Queen's Bench, in confounding the terms "accept" and "actually receive" of the statute, with each other, Bushel *v.* Wheeler[1] would be a more valuable case on the question of acceptance under the statute than it even now is. The action was brought by the assignees of A., a bankrupt, for goods sold and delivered: the plea being the general issue. The facts were that on March 19, 1842, the defendant, who was a miller in Hereford, gave to A., who was a manufacturer of machinery in Bristol, a parol order, at the manufactory, for some mill machinery, directing him to forward it by the Hereford sloop, belonging to one B., which was the usual mode of conveying goods by water from Bristol to Hereford. On April 23 the machinery was so forwarded, directed to the defendant; and, on the 25th, an invoice was sent to the defendant, with a letter of advice, by post; there being on the invoice a printed notice that the goods were supplied at three months' credit. On the arrival of the machinery at Hereford, *B., the owner of the sloop, put it into his own warehouse*, and the defendant was informed of the fact. The defendant did not return the invoice, nor give any answer to the letter of advice, nor did he interfere with the machinery in any way, which continued to remain in the warehouse of the carrier. At the close of the plaintiff's case, the defendant's counsel applied for a nonsuit, "on the ground that the Statute of Frauds had not been satisfied by proof of a delivery and acceptance;" acceptance here being, as usual, palpably used as the correlative of delivery and synonymous with actual receipt. The judge thought there was some evidence for the jury, which, we think, it is perfectly clear there was not. Evidence was then given for the defendant, that, six or seven months after the machinery had been sent, and when it was still in B.'s warehouse, the defendant told the warehouseman (the original carrier) that he did not intend to take it. *In October the machinery was taken back to Bristol;* obviously by the carrier, who seems to have taken it to his own wharf at Bristol; the goods having never been out of the possession of the carrier, nor in the possession of the defendant. The judge (Erskine, J.) directed the jury, that it was competent for the defendant to refuse to take the goods, and to set up as a defence that they had not been delivered to him, and left to them the question, whether there had been an acceptance in fact. *The jury negatived such an "acceptance;"* and the judge thereupon directed a verdict for the defendant, with leave to the plaintiffs to move to enter a verdict for £24 15*s.* 8*d.*, the value of the machinery, if the court

[1] 8 Jur. 582; s. c. 15 Q. B. 442, n.

should be of opinion that the "acceptance" by the carrier was sufficient to satisfy the statute. All through, here, the term "acceptance" is used in the customary indefinite way, as though it meant the "accept and actually receive" of the statute, or as though the word "accept" in the statute was mere surplusage, or was covered by the words "actually receive;" the fact being ignored that the statute requires that the buyer should "accept part of the goods so sold," as well as "*and* actually receive the same."

The case of Bushel *v.* Wheeler[1] is a very important case; but we fail to find it intelligently discussed by any of the text-writers.[2]

In this case, at last, Lord Denman, C. J., seems to have attained a kind of hazy knowledge that the word "accept" in the statute means something more than, or different from, *receive*. Thus, where counsel said, *arguendo*, and in doing so, showed the incorrect view of Tindal, C. J., in the matter: "In Maberley *v.* Sheppard,[3] Tindal, C. J., in delivering the judgment of the court, said, that 'the words of the statute point, as clearly as words can, to an actual delivery and actual receiving of part or the whole of the goods sold;'" Lord Denman added: "The words of the statute are even stronger; for the goods may actually come into the warehouse of the buyer, and yet not be *accepted*, which is the word used by the statute." And again, in his judgment, he says: "The general object of the statute, which the courts have been desirous to uphold, is to compel parties to make their contracts in writing. When the contract is not so made, the question, whether there has been an acceptance, must be a question of evidence, varying very much according to the particular circumstances of each case. The purchaser may depute another person to exercise a judgment for him as to the quality of the goods, or he may rely upon the judgment and integrity of the manufacturer from whom he orders the goods. *In these cases, it seems to me, there may certainly be an acceptance within the statute without an actual manual receiving.*" But, even here, Lord Denman seems still to have been laboring under the delusion, that, on the one hand, the acceptance would dispense with the actual receipt; and, on the other, that the "actual manual receiving" necessarily involves, or, in effect, includes, an acceptance; which, as must be perfectly clear to the intelligent student of law, is very far from being the case.

The judgment of Williams, J., too, shows the want of intelligence which characterizes the judgments of the court. He says: "I am of opinion that there should be a new trial in this case.

[1] 8 Jur. 532; 15 Q. B. 442, n.

[2] See Benj. on Sales, § 163; Camp. on Sales, 173, 182; Ch. on Contracts (9th ed.), 372; Br. on Stat. of Frauds, §§ 316 *g*, 316 *h*, 333; Wood on Stat. of Frauds, 605; Blackburn cites it, but does not discuss it. Blackb. on Sales (2d ed.), 23.

[3] 10 Bing. 99.

The moment it is held that *manual acceptance* [used here, palpably, as the equivalent of the actual receipt, not of the acceptance, of the statute] by the buyer is not necessary to satisfy the strong language of the statute, it follows that a *constructive acceptance* [? receipt] is sufficient. The larger in bulk the goods are, and therefore, in general, the greater the value of the goods in question, the more important is an *actual receipt* of them by the buyer himself; and, therefore, in the nature of things, a *constructive receipt* must be considered as satisfying the statute. If then, there may be a *constructive receipt*, the question must be left to the jury. It would be absurd to attempt to lay down any general rule as to what amounts to an *acceptance*. It must be submitted to the jury in each particular case, — Has there or has there not been an *actual acceptance?*" [1] We think it difficult to find, anywhere, a stronger instance of "confusion worse confounded" than this!

The rule was made absolute for a new trial. We think the refusal to grant a nonsuit, and the decision of the court to grant a new trial, were both wrong. In the first place, as far as can be learned from the statements of fact, and from the judgments, in both reports, whatever evidence there may have been of an acceptance, there seems not to have been a scintilla of evidence of an actual receipt by the defendant. Then, next. The jury, too, having negatived "an acceptance in fact," apparently meaning by this that the defendant had not, under the statute, actually received any part of the goods; and the question, assuming that there was any evidence to sustain the affirmative on this question, being for them, the case was concluded. The court, however, seeming to have discovered that the term "*actual* receipt" of the statute, was, whether it included the *acceptance* of the statute or not, — a point which seems never to have suggested itself to them, — such a receipt as at common law was a good receipt, whether manual, constructive, or symbolical; thought that the question, whether or not there had been, if not "an acceptance in fact," a "constructive acceptance" (meaning thereby, a constructive receipt), should expressly be submitted to the jury. As, however, the jury, if any sense at all can be made out of the case, in the mixed way in which the term "acceptance" is used throughout it, had already decided that there had been no actual receipt within the statute; and, therefore, they had already found that there had been no

[1] The very thing that Williams, J., here says should be submitted to the jury was precisely, virtually in the very terms, submitted in Bushel *v.* Wheeler, 8 Jur. 532, to the jury. "The learned judge directed the jury that it was competent for the defendant to refuse to take the goods, and to set up as a defence that they had not been delivered to him, and left to them the question *whether there had been an acceptance in fact*. The jury negatived *such an acceptance*." *Ibid.* 533.

"actual receipt," either manual, constructive, or symbolical; they had already decided that very question. If, to make any sense out of the case, the court were justified in requiring the question to be submitted to the jury, whether or not there had been, if not a manual, yet a constructive receipt; just as reasonably they should have directed that the question should have been submitted to them, if there were not an express acceptance, was there or not an implied one? By their finding, in the sense of the whole mass of the English cases, when they found that there had been "no acceptance" of the goods "in fact" by the defendant, the jury would seem to have found that there had been no acceptance, express or implied, and no "actual receipt," either manual, constructive, or symbolical.

But, on another ground taken in the case, the court below was wrong in not granting the nonsuit, and the Court of Queen's Bench were wrong in ordering a new trial. Entirely aside of the question that there was not, as far as the facts of the case, as stated in either of the reports, indicate, a tittle of evidence to show an actual receipt of the machinery by the defendant; it was claimed, independently of the question of acceptance of the goods, under the statute, that there was no delivery of the machinery to the defendant; and, therefore, correlatively, of course, there could be no receipt by him, because there could be no actual receipt where the lien is retained by the vendor, or his right of *stoppage in transitu* remains; citing Holroyd, J., in Baldey *v.* Parker.[1] That this right did remain, was, in effect, conceded by the court; but it was unsoundly alleged, that this did not furnish a test whether there had been an actual receipt or not; Coleridge, J., saying: "That right would remain if there was a note or memorandum in writing, and, therefore, much cannot be collected from applying that test." And Lord Denman, C. J.: "The tests which have been suggested, from a consideration of the right of *stoppage in transitu*, or of the right of lien, appear to me very imperfect, for the purpose of ascertaining the meaning of this provision of the Statute of Frauds."

Notwithstanding these very emphatic expressions of opinion, we confidently submit that the continuation or extinction, whether of the lien or of the right of *stoppage in transitu*, which is a kind of continuation of the lien, does furnish, under facts such as those in this case, an indubitable test as to whether or not there have been an acceptance and actual receipt, by the vendee, of the goods purchased by him. It is our purpose in the next succeeding Part to consider fully the question of lien in connection with

[1] 2 B. & C. 37, 44; stated by us, *supra*, p. 334.

the actual receipt of the statute; and, in a later Part, we propose examining fully the law as to *stoppage in transitu*. Here, on this latter point, we may say, as was, in effect, conceded by the court, that the facts did not show, at any time down to that of the return of the machinery by the carrier to his own wharf at Bristol, that the machinery was out of the actual possession of the carrier, or in that of the defendant, so as to have terminated the right of *stoppage in transitu*. The authorities, which we will cite fully in our Part on that subject, show correctly and conclusively that, under such facts as those in Bushel *v.* Wheeler, the right of *stoppage in transitu* was not gone. Then, the possession, being in the carrier, *quâ* carrier, was not in the defendant. And the possession not being in him, there could not have been (saying nothing of acceptance, which was also necessary in the case to get it out of the statute) an actual receipt, manual, constructive, or symbolical; for the actual receipt is the transfer of the possession by an "actual," that is to say, a manual, constructive, or symbolical delivery. Hence there was no actual receipt by the defendant, and, therefore, there was no question to be submitted to the jury.

While we find Benjamin on Sales [1] fairly redolent with error, yet, with the exception of his having ignored the position of the court in Bushel *v.* Wheeler, and in several other cases, in the following he is substantially correct, within limits which he has failed to notice, but which do not affect the law as it is applicable to the facts in Bushel *v.* Wheeler: "It will already have been perceived that in many of the cases the test for determining whether there has been an actual receipt by the purchaser, has been to inquire whether the vendor has lost his lien. Receipt implies delivery, and it is plain that so long as vendor has not delivered, there can be no actual receipt by vendee. The subject was placed in a very clear light by Abbott, J., in his decision in Baldey *v.* Parker.[2] 'Upon a sale of specific goods for a specific price, by parting with the possession, the seller parts with his lien. The statute contemplates such a parting with the possession, and, therefore, so long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute.' *No exception is known in the whole series of decisions to the proposition here enounced*,[3] and it is safe to assume, as a general rule, that when-

[1] So very different from that work on which it is ostensibly founded, and which it very largely appropriates, written by one of the ablest of the English judges or writers of his own time, or of previous times — Blackburn on Sales.

[2] 2 B. & C. 37.

[3] Benjamin here is completely astray, quite as much so as were Lord Denman and Coleridge, J., in Bushel *v.* Wheeler, 8 Jur. 532. When a note or memorandum in writing of the contract is signed by the party sought to be charged, and the goods are not sold on credit, the case

ever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted on in the latest as in the earliest cases." [1]

Precisely the same principle applies to the right of *stoppage in transitu* (which, as we have stated, is a kind of continuation of the lien) as it does to the lien itself. And this is, in effect, admitted, as will be seen by the utterances, which we have quoted, of both Lord Denman and Coleridge, J. Both of them connect the lien and *stoppage in transitu* as being equally within the same principle on the subject.

But it is said, and the same reasoning is used in other English cases, that the test is worthless; because the right of lien and of *stoppage in transitu* would remain if there were a note or memorandum of the contract in writing. So, indeed it would; and so it would remain if there were a payment as of earnest, or part payment; and, as we have shown in our note below, equally so where there have been a mere acceptance and actual receipt of *some part of the goods* without anything more. But that was not the case of Bushel *v.* Wheeler. There, there was no acceptance and actual receipt merely of *some part of the goods*, to take the case out of the statute. But there were an acceptance and actual receipt *of the whole of the goods*, or there was nothing. But if there had been an acceptance and actual receipt by the purchaser of the whole of the goods, then both the property and the possession would have been in him, the right of lien and of *stoppage in transitu* would have been gone, and the vendor could have sustained against him an action, for goods accepted and actually received, as for goods sold and delivered. It was thus in their failure to distinguish the difference in the effect of the acceptance and actual receipt of but part of the goods to make the contract "good" under the statute, but not affecting the right either of

is taken out of the statute; but the vendor has neither parted with his possession nor his lien. Precisely the same is the effect of the payment of earnest or part payment. The case is taken out of the statute, but the possession, and the vendor's lien, as an incident of it, both remain. And precisely the same effect too is produced where, under the statute, the buyer has accepted "*part* of the goods so sold," and actually received the same. The statute here simply declares that, in either of these cases, "the contract for the sale . . . shall be allowed to be good," and goes no further. So, there may be an "actual receipt," and the identical actual receipt named in the statute, and yet the lien and the right of *stoppage in transitu* both continue. Lord Denman, Coleridge, J., and other English judges saw this; and they were so far right. And yet, as we show in our text, they were still, in their misapplication of this principle, as radically wrong in Bushel *v.* Wheeler, and in the other English cases where the same mistake was made, in the one direction, where the *whole* of the goods have been accepted and received, as Benjamin, in his popular work on Sales, was, in the other; *i. e.* where only a part of the goods have been accepted and received; the lien continuing in this latter case and not in the former.

[1] Benj. on Sales, § 187.

lien or of *stoppage in transitu*, in the vendor, in respect to the goods, the possession of which, with its attendant lien, he has never parted with; from the case where not but a part has, but the whole of the goods have, been accepted by the vendee, actually delivered by the vendor, and as actually received by the vendee (whether manually, constructively, or symbolically), so that the property and possession have alike absolutely passed to the vendee, discharged of the lien, and exempted from the liability of *stoppage in transitu*. It was in the failure to notice this distinction that Lord Denman, Coleridge, J., and the other English judges, have been as wrong on the one hand as the late lamented Mr. Benjamin was on the other.

The case of Bushel *v.* Wheeler,[1] about the incorrectness in the decision of which we have, as we have shown, no doubt whatever, did not meet with the approval of the Court of Exchequer, in Norman *v.* Phillips.[2] The cases are very similar, and the law as laid down in this latter case, outside of the extent to which the court were hampered by the decision of Bushel *v.* Wheeler, is exactly as claimed by us in our comments on that case.

In Norman *v.* Phillips, the facts were that the plaintiff was a timber merchant in London and the defendant a builder in Wallingford, and that on April 17 the defendant gave a verbal order to the plaintiff's traveller for yellow deals, amounting in value to £32 14*s.* 4*d.*, with directions for them to be sent to the Paddington station of the Great Western Railway, to be forwarded to him, as had been the practice between the parties on previous occasions. On April 19 the deals arrived at Wallingford station, on which day the defendant was informed by the railway clerk that they were lying for him at the station, when he said he would not take them. An invoice was also sent on April 27, which the defendant received and kept; but it did not appear that he had ever seen the timber. On May 28 the defendant informed the plaintiff that he declined to take the goods, and on June 22 made a similar communication in writing to the railway clerk. The defendant, on the trial before Pollock, C. B., claimed a nonsuit, on the ground "that there was no evidence of a sufficient acceptance" to satisfy the Statute of Frauds. The nonsuit was refused, and a verdict was ordered for the plaintiff, with leave reserved for a nonsuit or verdict for the defendant. On a rule obtained, the plaintiff's counsel relied mainly on Bushel *v.* Wheeler.[3]

[1] 8 Jur. 532.
[2] 14 M. & W. 277.
[3] 8 Jur. 532. And see Dawes *v.* Peck, 8 T. R. 330; Hart *v.* Sattley, 3 Camp. 528; Coleman *v.* Gibson, 1 M. & Rob. 168; Dodsley *v.* Varley, 12 A. & E. 632; Phillips *v.* Bistolli, 2 B. & C. 511; Egan *v.* Dudfield, 1 Q. B. 302; Blenkinsop *v.* Clayton, 7 Taunt. 597.

The court admitted that it was difficult to distinguish this case from Bushel *v.* Wheeler, and took time to consider. We think that there is no substantial distinction between Bushel *v.* Wheeler and this case, except that in the former case, while, as in the latter, the goods had never been *actually received* by the defendant, the goods there, which had in the mean time remained in the carrier's warehouse, subject to the right of *stoppage in transitu*, had been reconveyed by the carrier, who all along had retained the actual possession of them, to the original place of shipment, where they were still held by the carrier at his own wharf; he thus as carrier exercising active domination over them after they had been refused receipt by the vendee. In this respect Bushel *v.* Wheeler is a slightly stronger case for the defendant than Norman *v.* Phillips.

On the argument of Norman *v.* Phillips, the law, as far as it was considered (with the usual allowance for the confounding of the terms "accept" and "receive"), we think was correctly stated. Counsel said: "A delivery to a carrier named by the vendee is tantamount to a delivery to himself;" to which Alderson, B., replied: "Can there be an acceptance so long as the buyer has a right to object to the quality of the goods? And is he precluded from objecting because he directs them to be sent by a particular conveyance? The case of Johnson *v.* Dodgson[1] shows that he is not." And, again, by counsel: "In Coleman *v.* Gibson[2] it was held that a party, who has the right of approval, must refuse to accept the goods in a reasonable time; and if he does not he is to be treated as having accepted them." Alderson, B.: "There is no doubt that, by retaining goods which have been delivered an unreasonable time, the party to whom they are delivered loses his right to object to them, and it amounts to acceptance. But I cannot see how there was any acceptance here. The person to whose possession these goods came was not the person to examine the quality of them." Pollock, C. B.: "The defendant objected at the time to take the goods away. He was not bound to send them back again." Counsel: "There was evidence to go to the jury of acceptance. He was told of the arrival of the goods, and afterwards received an invoice of them, which he kept, without informing the plaintiff that he declined to receive them. That, it is submitted, is evidence of acceptance." Alderson, B.: "He must accept the goods, and *actually receive the same*,[3] to con-

[1] 2 M. & W. 653.
[2] 1 M. & Rob. 168.
[3] These italics are by Alderson, B.; but the learned judge failed to notice that the acceptance is one thing, under the statute, and the "actual receipt" quite another. So, not only must there be enough to "constitute an acceptance," but, beyond this, there must be an actual receipt, consisting of an actual [illegible] of

stitute an acceptance within the meaning of the statute. Here the goods are sent in the usual way, but when they arrive at the carrier's warehouse the defendant refuses to take them. That can scarcely be said to be an acceptance." Counsel: "The lapse of time made it a question for the jury, whether the defendant had accepted the goods or not." Alderson, B.: "If the carrier was not the defendant's agent to accept the goods in the first instance, I do not see how he becomes so from the goods being in his possession for some time. The strength of the argument is certainly the non-communication of his refusal to take them." Counsel: "It amounts to an acceptance by acquiescence." Alderson, B.: "Where goods are in a party's own hands he has an opportunity of examining them; and his saying nothing in such a case would be evidence of acceptance by acquiescence." Counsel: "Here the carrier was the agent of the defendant, designated by him; and he was his agent not only to *receive*, but to *accept* the goods." Alderson, B.: "No; he was not his agent to accept them. An acceptance is not complete until the party has precluded himself from objecting to the quality of the goods."

What was here ultimately mainly relied on was the want of prompt notice by the defendant to the plaintiff of the refusal to receive the goods. But that, neither in this case nor in Bushel *v.* Wheeler, is really a difficulty at all. To take the case out of the statute, the plaintiff must make out affirmatively that there have been both acceptance and actual receipt. Where there has been no actual receipt, the fact of not giving notice of a refusal to accept, or to receive, will not supply the want of the *actual* receipt of the statute. Where there has been an actual receipt, and no notice of refusal to accept, then an acceptance, which, as we have seen,[1] may be either express or implied, may be fairly presumed where, after the actual receipt of the goods, there has been an undue holding of them by the vendee without any notice of their rejection.

But, — where the sale is not of specific goods, so as in itself to imply an acceptance, — in the absence of the actual receipt required; the actual change of possession, manually, constructively, or symbolically; there is nothing, in the absence of an actual receipt, from which even the presumption of an *acceptance* can arise, to say nothing of the want also of the actual receipt. The

possession; so that, where the whole of the goods are claimed to have been delivered, the right of *stoppage in transitu* is gone; and, on the other hand, such an acceptance, where the actual goods which have been accepted are received, as, in the language of Alderson, B., himself, "is not complete until the party has precluded himself by what he does from objecting to the quality of the goods."

[1] *Supra*, p. 318 *et seq.*

statute prohibits a presumptive receipt, as distinguished from an actual receipt, and requires an actual receipt, *i. e.*, such as would ordinarily be an actual transfer of the possession at common law, which there was not in Bushel *v.* Wheeler or in Norman *v.* Phillips.

The distinction here between the delivery to a carrier, where the *actual* possession (or receipt) is not in the vendee so long as the right of *stoppage in transitu* remains, and the delivery to a servant, which, in effect, is the actual receipt of the vendee, is marked. In the latter case there must be a prompt rejection, virtually the same as where the actual delivery has been made to the vendee; or an acceptance, after an undue lapse of time, may fairly be presumed. But, in the case of the carrier, where there has been no actual receipt by the vendee, *à fortiori* where there has been an express refusal to receive from the carrier,[1] there being neither acceptance nor receipt, there is nothing whatever in the absence of receipt from which an acceptance can be presumed or implied. And hence, in the absence of an actual receipt, there is no necessity of notice; for nothing has taken place from which an acceptance can be presumed. And even if there had been, in the absence of the actual receipt, the requirements of the statute would still be unmet.

The court, unanimously, made the rule absolute, Alderson, B., in delivering his judgment, saying: "The true rule appears to me to be that acceptance and delivery under the Statute of Frauds *means* [*sic*, showing the confounding of accepting with receipt] such an acceptance as precludes the purchaser from objecting to the quality of the goods; as, for instance, if instead of sending the goods back, he keeps or uses them. Here the goods were not in the possession of the party himself, though the same rule would hold if they were delivered to a general agent, or to a party who is authorized by him to examine the quality of the goods. *But the carrier is only an agent for the purpose of carrying* [This is thoroughly accurate. He is, *quâ carrier*, not the agent of the vendee either for accepting or actually receiving the goods under the statute. Of course this has no application where, under the statute, there have been acceptance of the goods, and an actual delivery and actual receipt by the vendee by a delivery to him, or

[1] In Norman *v.* Phillips, 14 M. & W. at p. 282, a doubt is expressed by Alderson, B., as to the materiality of the evidence that the defendant refused to receive the goods from the carrier. This doubt evidently arises from the failure to notice the distinction between refusing to receive the goods and a refusal to accept them, within the meaning of the statute. We think the evidence of the vendee's refusal to receive the goods from the carrier was both admissible and material. So long as the possession of the goods was in the carrier he was the agent of the shipper to deliver them; and, therefore, evidence of the refusal to receive the goods from the carrier was evidence of refusing to receive them from the shipper, — the vendor; and, therefore, that there was no actual receipt of them under the statute.

to his agent or servant, or to his own ship. Or there may be in the latter case an actual receipt and no acceptance.]; and here the purchaser himself immediately refused to take the goods. If a carrier is not originally an agent to accept [? receive. He is, in fact, *as carrier*, neither an agent to receive or accept.] the goods, he cannot be made so by mere lapse of time." The other judges concurred in the decision. Alderson, B., said further: "If it had not been for the case of Bushel *v.* Wheeler I should have said there was no evidence whatever for the jury of acceptance." The rest of the court were evidently of the same opinion of the unsoundness of the decision of that case, and so far as the Court of Exchequer could reverse a decision of the Court of Queen's Bench, Bushel *v.* Wheeler[1] is, in effect, declared not law by Norman *v.* Phillips;[2] which latter case, though there is not in it, even, an exact appreciation of the difference between the accepting and the actual receipt of the statute, is much more intelligently decided than is the former utterly untenable case.

Benjamin incorrectly says,[3] and with him, with similar incorrectness, concur many of the law writers, both English and American[4] (even that usually extremely accurate writer, Blackburn, sharing in the mistake), — "It is settled that the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute an acceptance, these agents having authority *only to receive*, not to accept the goods for their employers. . . . It is well settled that the delivery of goods to a common carrier, *à fortiori* to one specially designated by the purchaser for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. In such cases, the carrier is, in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose. It must not be forgotten that the carrier only represents the purchaser for the purpose of *receiving*, not accepting the goods. The law in the United States is the same: Cross *v.* O'Donnell,[5] Caulkins *v.* Hellman."[6]

This, we think, will be evident, from what we have written, to be palpably unsound. The mistake arises, clearly, from the failure in so many of the English cases relied on by the text-writers,

[1] 8 Jur. 532.
[2] 14 M. & W. 277.
[3] Benj. on Sales, §§ 160, 181.
[4] For some of them, see Blackb. on Sales, 2d ed. 17, 22; Br. on St. of Fr. §§ 327 *b*, 328; Wood on St. of Fr. 558; 3 Pars. on Con. 7th ed. 53, 54; *47, *48; Ch. on Con. 9th ed. 374; Newmark on Sales, § 285. But see, *contra*, 2 Add. on Con. 8th ed. 433–435; *918, *919; and Campb. on Sales, 184–186. The authority of a carrier *qua* carrier is to carry and deliver, not to "accept" and "actually receive" for the vendee. Other questions arise out of bills of lading, which we consider in a later volume of this work, in discussing the subject of *stoppage in transitu*.
[5] 44 N. Y. 661.
[6] 47 N. Y. 449.

to give due effect to the terms in the statute, *accept and actually receive;* the statute implying that some part of the goods purchased shall not only be accepted by the buyer as the very subject of the contract, but that there shall be an actual transfer of the possession; which change of possession must be an *actual* change, though to effect such transmission the delivery may, as usually at common law, be manual, constructive, or symbolical. The carrier, then, *qua* carrier, is neither the agent of the vendee to accept, or actually receive the goods under the statute; but is simply, as was held by the Court of Exchequer, in Norman *v.* Phillips,[1] as expressed by Alderson, B., "only an agent for the purpose of carrying." And, therefore, as long as the carrier holds the goods as carrier, and the goods have not come into the actual possession of the vendee (such possession being either manual, constructive, or symbolical), and the right of *stoppage in transitu* still continues to exist with reference to them, so long, we think, it is clear there has been no such actual receipt of them, — much less from that fact, any implication arising of that entirely different thing, the acceptance of the statute, — which furnishes, with the acceptance, the evidence to make the contract be deemed "good," under the requirements of the seventeenth section of the Statute of Frauds.

The carrier, as such, is in no sense the agent of the vendee, either to accept or actually receive under the statute. The fact that the vendee instructs the vendor to ship the goods by a particular route or by a named carrier, does not make the carrier his agent, either to accept them or to take the actual receipt or possession of them for him, under the statute. The carrier becomes the shipper's agent to *receive*, *carry* and *deliver* the goods. After the goods are received by the carrier to be carried, they still remain at the disposition and under the control of the shipper, who can direct them, then, at his will; clearly showing that the receipt is for him. Again, he may consign them to a particular person; but that person, therefore, is not bound to accept the consignment. The consignee may refuse to accept the goods or pay the freight; in which case, clearly, the property remains in the shipper, and his goods are liable for the freight; the consignee, except by his own will, having no such liability imposed upon him by the act of the consignor. But when, at the place of shipment, the goods are delivered, by the authority of the vendee, to his agent, or to his ship, so that there is an actual transmutation of the property and possession in and to him, so that the vendor's possession, control, lien, and right of *stoppage in transitu* are gone; then, and not till then, we think, — outside of the question of acceptance and actual

[1] 14 M. & W. 277.

receipt of a "part of the goods," — are the requirements of the statute met as to the actual receipt required under the statute; the acceptance, even then, where the facts do not show an acceptance as well as an actual receipt, being still open until exercised by the vendee, expressly or impliedly.

In Chapman *v.* Morton,[1] which was a case of sale by sample, the defendant, after the receipt of the goods, on examination of them, claimed that they were not according to sample, and notified the vendors that he repudiated the sale; but, subsequently advertised the goods for sale in his own name, and sold them in his own name. In an action for the price of the goods, as goods sold and delivered, the court held that, notwithstanding the vendee's notice of rescission, he, in thereafter treating them as his own, had accepted them. This case, though not under the Statute of Frauds, is applicable; the acceptance here being exactly the acceptance of the statute.[2]

Where an order for goods made, and for others to be made, forms one entire contract, acceptance of the former goods will take the case out of the statute as regards the latter also.[3]

In Lillywhite *v.* Devereux,[4] the court held, that if the conduct of a defendant in dealing with goods already in his possession, is wholly inconsistent with the supposition that he has not the possession as owner, — as if he sells or attempts to sell the goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alters the nature of the property, or the like, — he may be properly said to have accepted and actually received such goods, so as to take the case out of the Statute of Frauds, where there has been a contract under which he has held the goods in possession. But, in this case, where A., being himself yearly tenant of a house to B., under-let the house and furniture at a weekly rent to C., A., being desirous of getting rid of his tenancy at the end of the current year, offered to sell the furniture to C. for £50; which C. thought too much, but verbally agreed to have it valued, and to pay so much as it should be found worth, on B.'s agreeing to accept him as his tenant instead of A. The furniture

[1] 11 M. & W. 534.

[2] See further, as to dealing with goods being an acceptance of them, by the vendee, after his actual receipt, Street *v.* Blay, 2 B. & Ad. 456; Horncastle *v.* Farren, 3 B. & Ald. 497; Parker *v.* Palmer, 4 B. & Ald. 387; Campbell *v.* Fleming, 1 A. & E. 40; Hunt *v.* Silk, 5 East, 449; Coleman *v.* Gibson, 1 M. & Rob. 168; Healey *v.* Utly, 1 Cow. 345; Lawrence *v.* Dale, 3 Johns. Ch. 23, 42. And as to the right of the vendor to resell the goods on account of the vendee, on the wrongful repudiation of the goods by the latter, Sands *v.* Taylor, 5 Johns. 395; Girard *v.* Taggart, 5 S. & R. 19.

[3] Scott *v.* The Eastern Counties Ry. Co., 12 M. & W. 33; Mills *v.* Hunt, 17 Wend. 333; 20 Wend. 431; Baldey *v.* Parker, 2 B. & C. 37; Shirley *v.* Heyward, 2 H. Bl. 509; Elliott *v.* Thomas, 3 M. & W. 170.

[4] 15 M. & W. 285, 291.

was valued at £80, which C. refused to give, but then offered the £50. Before the expiration of the year, an agent of A. took the key out of the door and gave it to C., telling him that he must settle with A. himself about the furniture. B. refused to accept C. as his tenant, and he continued to occupy the house and use the furniture as before, but continually giving notice to A. to take away the furniture, which he refused to do; and after a lapse of three months, C. sent it to a place of deposit, and notified A. It was held, on these facts, that there was no evidence of an acceptance by C. of the furniture, under a contract of sale, to satisfy the statute.

Farina *v.* Home[1] is another case where Bushel *v.* Wheeler[2] was relied on, and where again the Court of Exchequer refused to follow the principle of that case, and where the clear distinction which we have taken as between the acceptance and the actual receipt of the statute (and which in so many cases in the English Court of Queen's Bench has been singularly ignored) is sustained. The case, too, in effect, like Norman *v.* Phillips,[3] is opposed in principle to the doctrine laid down by Benjamin and other writers,[4] as to the carrier, *quâ* carrier (and if carrier, then warehouseman), being the agent of the vendee to actually receive the goods to satisfy the statute.

The case of Farina *v.* Home was an action for goods sold and delivered. The defendant, residing in London, verbally ordered from the plaintiff at Cologne, in July, 1845, goods for the price of £15, to be shipped to the defendant. The goods were accordingly sent by the plaintiff to his shipping-agent in London, named Brenchley, who received them, and warehoused them with one Barber (a wharfinger), at the same time informing the defendant of their arrival. On receipt of the goods, Barber handed to Brenchley a delivery warrant, dated 21st July, whereby they were made deliverable to Brenchley or his assignee by indorsement, on payment of rent and charges from the 25th of July. Brenchley forthwith indorsed and sent it to the defendant, who kept the warrant for about ten months, and, although repeatedly applied to to pay the price of and charges on the goods, he did not do so; and he refused also to give back the warrant, saying that he had sent it to his solicitor, and that he intended to defend the action, for he had never ordered the goods, adding that they would remain for the present in bond. The statute being relied on, the question was left to the jury whether the defendant had accepted and actually received the goods; the court directing the

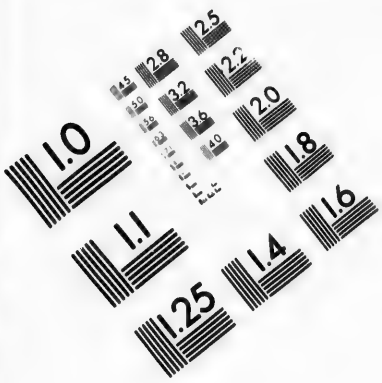
[1] 16 M. & W. 119.
[2] 9 Jur. 532.
[3] 14 M. & W. 277.
[4] See *ante*, p. 363.

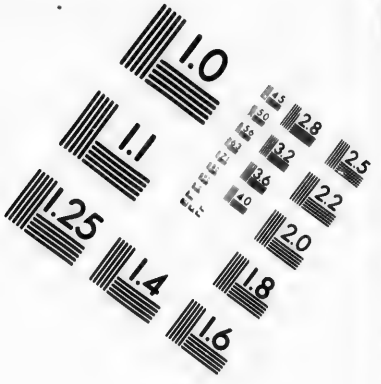
jury that, to amount to this, the acts of the vendee must show his intention of taking possession of the goods as owner. The jury found for the plaintiff for £16 11*s*. The Court of Exchequer set aside the verdict, and ordered a new trial. Parke, B., in delivering the unanimous judgment of the court, said, "On a motion for a new trial we intimated our opinion that there was evidence to go to the jury of the defendant's *acceptance* of the goods by retaining the delivery warrant; but defendant's counsel insisted that there was no sufficient evidence of the *actual receipt* of the goods, that is, the *delivery* of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee; and that the delivery and receipt of the warrant was not in effect the same thing as the *delivery* and *receipt* of the goods; and we are all of that opinion. That warrant is no more than an engagement by the wharfinger to deliver to the consignee or any one he may appoint; and the wharfinger holds the goods as the agent of the consignee[1] (who is the vendor's agent), and his possession is that of the consignee until an assignment has taken place and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him. In the mean time the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee.[2] We all, therefore, think that though there was sufficient evidence of the acceptance, if the goods had been delivered to the defendant, there is none of the *receipt;* and therefore there must be a new trial."[3] The distinction, even

[1] "*Consignor*" is the word used here; but the context shows this is a mistake. The very next words show this: "Who is the vendor's agent," the vendor being the consignor, and his agent the consignee. The correction is a material one to the argument and sense. The next use of the word "consignee" we have quoted is correct in the text of the report.

[2] Precisely as is the bill of lading "*an offer* to hold the goods" for the consignee where there is a bill of lading. And as, in the case of the warehouseman, until there has been an actual delivery of the goods by their manual transfer, or a constructive delivery by such "attornment," the lien of the vendor continues in the right of *stoppage in transitu*, and the actual receipt of the goods and their actual or constructive possession are not in the vendee; so equally is it where the goods are in the possession of the carrier, — *qua* carrier, — his possession being a continuance of that of the vendor until the goods have come into the actual or constructive possession of the vendee, so as to extinguish the right of *stoppage in transitu*. But in Bushel *v.* Wheeler, 8 Jur. 532, and Norman *v.* Phillips, 14 M. & W. 277, there seems not to have been any bill of lading or warehouse warrant transferred; and, therefore, there was not, as in Farina *v.* Home, 16 M. & W. 119, even a transfer of the *indicia* of possession, much less of the possession itself, which, as a continuance of the vendor's possession, really remained in the vendor. Farina *v.* Home, therefore, in this respect, goes even farther than Bushel *v.* Wheeler, or Norman *v.* Phillips, though in principle in entire accord with the holding in the latter case.

[3] And see Bill *v.* Bament, 9 M. & W.





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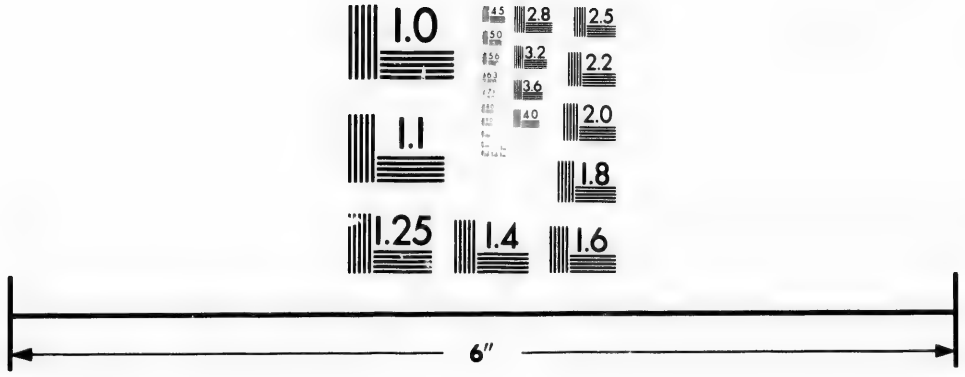

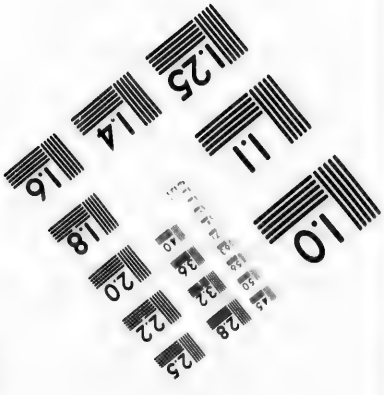

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here, between "acceptance" and "receipt" is not as clear as it would be if these terms were not so generally confounded as they are in the cases.

In Walker *v.* Nussey,[1] which was an action for goods sold and delivered, the goods, having been actually received by the defendant, were returned within two days of their receipt as inferior to sample, and the jury having found that they were returned in a reasonable time, and that there was therefore no acceptance of the goods to take the case out of the statute, the verdict was sustained. The presumption in this case would seem to be that the goods were not equal to sample, and were therefore properly rejected, — not being the goods which were purchased, and which by the purchase by sample were agreed to be taken as the subject of the purchase if they conformed to the sample. See the latter portion of this Part, where the effect of a sale by sample, as in itself an acceptance where the bulk conforms to the sample, is considered.

There is an intimation by Maule, J.,[2] in Beaumont *v.* Brengeri,[3] during the argument of the case, that there might be an actual transfer of the possession or an actual receipt of the goods under the statute, and yet the vendor retain his lien for the price. But the decision itself is inconsistent with that view. The case was one where it was held that the dealing with a carriage was sufficient to show an acceptance and actual receipt of it, even though it remained in the custody of the vendor. The ground upon which the decision was based was that the vendor had ceased to hold the carriage as owner, and merely held it as a warehouse-keeper for the vendee. Having ceased to be owner, and retaining "possession merely in the character of agent" (as it was held in the case that he did), with his possession as owner his lien as owner was necessarily gone.

Lord Denman, C. J., in Curtis *v.* Pugh,[4] again shows the confusion of his mind in reference to the terms "acceptance" and "actual receipt" of the statute. In the case tried before him,

36; Hanson *v.* Armitage, 5 B. & Ald. 557; Howe *v.* Palmer, 3 B. & Ald. 321; Bentall *v.* Burn, 3 B. & Cr. 423; Zronlger *v.* Samuda, 7 Taunt. 265. And see the *nisi prius* case of Gorman *v.* Boddy, 2 C. & K. 145, which was a case of the shipment of goods by a carrier named by the vendee; and although Cresswell, J., intimates that there might be a delivery to the carrier as the defendant's agent, he refers to the possession of the goods as being in the carrier. As a general rule, the carrier in receiving goods receives them for the shipper, his duty being to carry and deliver them as the shipper may direct. As between the vendor and vendee, the carrier's duty, in their delivery by the ship, is to deliver them for the shipper (who can direct them as he pleases), not to receive them for the consignee, who, at the time of the receipt, is usually unknown to the carrier. After the shipment of the goods the shipper, by the bill of lading, can control them at will.

[1] 16 M. & W. 302.
[2] At p. 308.
[3] 5 C. B. 301.
[4] 10 Q. B. 111.

notwithstanding the jury found that the defendant had not dealt with the goods so as to make them his own, and had done no more than was necessary for an examination of their quality, a verdict was entered for the plaintiff; leave being reserved to enter a nonsuit. The court above, including Lord Denman himself, were unanimous for a nonsuit. In this case there was an actual receipt; but the evidence showed a rejection of the goods after their actual receipt. Lord Denman said, "There must be both a delivery and an acceptance. Here the evidence showed a rejection." That is, in this case, there was an actual receipt of the whole of the goods, but, in addition to that, there must be an acceptance of them; namely, an approval, — a taking to them as the subject of the contract. Patteson, J., says, "If he had looked them over and selected them long before, and, when they came to his warehouse, had refused to have them, that would not be a case of goods sold and delivered." No! nor would it answer the requirements of the statute. It would be an acceptance of the goods under the statute, but a refusal to receive them, — the exact converse of the actual receipt required. And, again, Patteson, J.: "A confusion sometimes arises in applying the Statute of Frauds to the case of goods sold and delivered. If the purchaser actually takes the goods into his possession, that is an acceptance [the meaning of this is a little indefinite] independent of the statute; but there may be an acceptance sufficient to satisfy the statute, which may yet not support an action for goods sold and delivered."

If by this is meant, which we scarcely think it is, that as the acceptance is an independent entity from the actual receipt of the statute, there may be an acceptance without an actual receipt; and, therefore, that there may be an acceptance unaccompanied by a delivery, without which latter the action for goods sold and delivered will not lie, then this exactly accords with our whole contention in this Part. But this distinction is, as we have shown, one that has been entirely lost sight of in the Court of Queen's Bench in an immense number of cases; and we doubt if this was the meaning of Patteson, J., in this instance. If the language is used in the sense that there may be an acceptance and actual receipt to satisfy the statute, and yet not be sufficient to sustain a count for goods sold and delivered, then we answer: Yes, an acceptance and actual receipt of some "part of the goods so sold" is sufficient to satisfy the very language of the statute; and even a sample, if taken out of the very bulk of the goods sold, is, as we have seen *supra*, a sufficient part. But, of course, this will not sustain a

count for goods sold and delivered for the whole of the goods when nothing but a mere sample has been delivered.

But, we think, where the *whole* of the goods have been accepted and actually received so as to satisfy the statute, then the action for goods sold and delivered will be sustained, and no exception whatever to this rule, which we have not found stated elsewhere in text-book or cases,[1] occurs to us. We do not say that the converse of this, namely, that no action for goods sold and delivered can be sustained unless there have been an acceptance and actual receipt under the statute; that is a question which we intend considering in subsequent parts of this work.

There are cases which hold that the action for goods sold and delivered will lie where there is a contract, as, for instance, where there has been a memorandum in writing of the contract, or a part payment; and, therefore, where there have been an acceptance and an actual receipt of *a part* of the goods in cases where there has been a passage of the property by an assignment of the bill of lading, so that an action for an injury to the goods would be properly brought by the consignee. In such cases it has been held that the action as for goods sold and delivered would lie, and yet that the receipt of the carrier, *quâ* carrier, would not be the actual receipt by the consignee of the whole of the goods, where that was the evidence to show the existence of a contract within the Statute of Frauds. The cases we have cited in this and in the next succeeding Part clearly establish that there have been no acceptance and actual receipt of the whole of the goods to satisfy the statute, so long as the vendor's lien or right of *stoppage in transitu* intervenes to prevent the actual transfer of the possession to the vendee. But in all cases where *the whole* of the goods have been accepted and actually received, to satisfy the statute, an action for the price as for goods sold and delivered will lie.

But we have, so far, found no case where it has been claimed that *the whole of the goods* have been accepted and actually received under the statute, but what, if that were sustained, a count for goods sold and delivered should also be held to lie. We submit this as a test, to which no exception whatever occurs to us; and on principle we can see no room for such exception. We

[1] In Curtis *v.* Pugh, 10 Q. B. 111, itself, we find an intimation by counsel, in reply to Patteson, J., which points in the direction we have indicated; thus (at p. 114): "The plaintiff here does not rely on *an acceptance of part*. The *whole* quantity of goods is put into his hands; and he is to explain why he does not pay for them." We think that in Curtis *v.* Pugh, 10 Q. B. 111, notwithstanding the holding in the case to the contrary, there are both an acceptance and an actual receipt of the goods within the meaning of the statute. See Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481; Cusack *v.* Robinson, 1 B. & S. 299. And see the question fully considered, *supra*, in this and in the next succeeding Part.

repeat, where there have been no acceptance and actual receipt of a part of the goods, and it is claimed, as in Bushel *v.* Wheeler,[1] in Norman *v.* Phillips,[2] and in many other cases, that there have been an acceptance and actual receipt of *the whole of the goods*, if an action as for goods sold and delivered will not lie, then the requisites of the statute with respect to the acceptance and actual receipt have not been met. And while we have nowhere met with this test stated, no possible case even of an exception to this rule occurs to us, and we think the test in the precise terms in which we have stated it is an infallible one. So, again, on the same principle, where the whole of the goods have been accepted and actually received, the vendee becomes the absolute owner, and can maintain trover for the goods.[3]

The case of Curtis *v.* Pugh[4] is, unlike nearly all the cases in the Queen's Bench (resulting from their improperly confounding the accepting and the actual receiving of the statute, as though these terms were, in effect, synonymous), a valuable one, whether rightly or wrongly decided, on the question of the acceptance under the statute, independent of the actually receiving thereunder. This was a sale of two hogsheads of glue, which the defendant, the vendee, actually received in his own warehouse, and which, as the jury found, accorded with the description of glue bought by him. He unpacked the whole of the glue and put it into twenty bags, and then, claiming that the glue was inferior, refused, in the words of the case, to "accept" it. The plaintiff refused to take the glue back because it had been unpacked and put into bags. The defendant repacked the whole and sent it back to the plaintiff, who refused to receive it. It was in evidence that it was unnecessary to do more than take a cake or two out for the purpose of examining the contents of the hogsheads, and also that glue, if taken out of the casks in which it is packed, cannot be replaced there in the same condition. The jury having found that the defendant had not dealt with it so as to make it his own, nor done more than was necessary for an examination of the quality, the court held that, on this finding, the plaintiff should have been nonsuited; Coleridge, J., interrogatively laying down the principle that, if the party examines the goods *bonâ fide* with a view of ascertaining the quality, but so carelessly as to do them great harm, that does not amount to an acceptance, whatever be the result of the examination.

While we think that that which is above laid down in Curtis *v.*

[1] 8 Jur. 532.
[2] 14 M. & W. 277.
[3] See Saunders *v.* Topp, 4 Ex. 390, stated *infra*.
[4] 20 Q. B. 111.

Pugh[1] is correct as to the general doctrine of acceptance, where goods which have been actually received are promptly rejected, showing that in such case there is no acceptance, but its opposite, a rejection, we are more than doubtful as to the soundness of the decision of the case itself outside of one point which is not taken in the case. The purchase was here virtually of specific goods, "Cox's best glue," and the glue was rejected because it was alleged to be inferior. But the jury expressly found that it was not inferior. Hence the goods were the exact goods which the defendant had bought, and which, by the act of specifying and designating them, he assented to, accepted, recognized as the very goods which he had purchased. This, we think, was an acceptance of them within the meaning of the statute, and that after their actual receipt they could not be rejected, if they were the very goods which he had assented to, — as the jury in this case found they were, — as the very subject of the purchase. We think the latest cases in England sustain this view. See our examination of them in the latter portion of this Part.[2]

A doubt was expressed in the Court of Exchequer by three out of the four judges sitting in Saunders *v.* Topp,[3] as to whether, under the statute, "there can be," in the language of one of them, "an acceptance prior to the receipt," or, in the language of the others, "an acceptance before delivery."[4] Here it is again evident how much the terms "acceptance," "receipt" and "delivery" are confounded, as though there could not be an acceptance without a receipt; and, as has been the case so often in the Queen's Bench, it was deemed that acceptance merely meant receipt without rejection, and that there could be no acceptance which was not involved in the receipt. The language and spirit of the statute are, however, very different. The provision there is, as we have seen, *ad nauseam*, that the vendee must accept *and* actually receive, treating the acceptance and receipt as essentially different, and not only so, but clearly implying that the acceptance may be made and yet never be followed by the actual receipt, which is *also* necessary to make the contract be deemed good. Parke, B., with, evidently, in this case, a better appreciation of the meaning and force of the statute than that of his three colleagues, Alderson, Rolfe, and Platt, BB., was clearly not a sharer in their doubts.

[1] 10 Q. B. 111.

[2] And see our consideration of the next case we state, Saunders *v.* Topp, 4 Ex. 390.

[3] 4 Ex. 390.

[4] See Cusack *v.* Robinson, 1 B. & S. 299; The Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481, where there was such an acceptance; in the former case expressly under the statute of frauds. And see also *per* Lord Campbell, C. J., in Morton *v.* Tibbett, 15 Q. B. 428, where he incorrectly says that the acceptance either preceded or was contemporaneous with the receipt. It may be either, or it may succeed the receipt.

He, treating the acceptance and actual receipt of the statute as essentially different, as, notwithstanding the dreadful confusion on the subject pervading the English cases, they unquestionably are, says: "At common law the property would pass by the contract of bargain and sale, but there must be either a part payment or *an acceptance and receipt* of the goods." And, "I am of opinion that there was evidence for the jury of *the acceptance and receipt*. . . . To satisfy the Statute of Frauds there must be an acceptance *and a receipt* of the goods. A receipt implies delivery." In this there is correct appreciation of these terms; receipt and delivery are correlative terms; acceptance is neither synonymous with receipt nor the correlative of delivery.

There was, in Saunders *v.* Topp,[1] an unquestionable acceptance, before the actual receipt, of sheep purchased by the defendant from the plaintiff. In the case, the defendant went with the plaintiff to the latter's farm, and there selected from the flock forty-five specific couples of ewes and lambs, which he bought at 40*s.* a couple, and directed the plaintiff's shepherd to send them to his (the defendant's) field, at another place, which was subsequently done, and the defendant then took possession of them, and removed them to another place. The acceptance was complete when the specific sheep were selected and specifically purchased; and, with the subsequent actual receipt, supplied the evidence of the contract of sale required by the statute.[2]

With the forty-five couple of sheep so accepted other sheep were sent, which the defendant had verbally ordered, but had not seen nor accepted, as he had done the forty-five couple. On the actual receipt of the whole, he dealt with them all alike. The court nominally held that his dealing with them then as he did, was *then* an acceptance of the forty-five couple, but not of the others. But, had there not been the *previous* acceptance of the forty-five couple, the subsequent acts of the defendant on their "actual receipt" would have been no more an acceptance of them than of the other sheep which he then actually received, but had not previously accepted. The case is correctly decided, although much of the reasoning in it, by Alderson, Rolfe, and Platt, BB., who, not appreciating the meaning of the statute, questioned whether there could be an acceptance without a delivery and receipt, is not sound.[3]

[1] 4 Ex. 390.

[2] Browne in his excellent work on the statute (which work should be in the hands of all the English and American judges) very correctly says: "Where the thing contracted to be sold is defined, specified, and ascertained at the time of the purchase, proof of the fact that the buyer then agreed to buy that particular thing, and consequently thereby finally recognized and identified it as the particular thing he was to get, will, in general, be a sufficient proof of an *acceptance* by him." Br. on Stat. of Frauds, § 321 *a*.

[3] See Cusack *v.* Robinson, 1 B. & S. 308; Bog Lead Mining Co. *v.* Montague,

The case of Morton *v.* Tibbett[1] is an important case on another phase of the subject. There, Lord Campbell, C. J, in delivering the unanimous judgment of the court, after a quite full examination of the authorities, concludes "that there may be an acceptance and receipt of goods by a purchaser, within the Statute of Frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract."

In the judgment, Parke, J. (who has a much clearer idea of the force and effect of the clause in the statute relating to the meaning, force, and effect of the acceptance and actual receipt of the statute than most of the English judges; although even he, as we shall see in our comments on this case, is not entirely accurate), is quoted as saying in Smith *v.* Surman[2] as follows: "The later cases have established, that unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part acceptance." To which Lord Campbell adds: "*That there can be no acceptance and receipt by the purchaser while the lien of the vendor remains is clear enough, for the vendor's lien necessarily supposes that he retains the possession of the goods;* but I must be permitted to doubt whether the cases referred to have established the residue of the rule." And, referring to Norman *v.* Phillips,[3] Lord Campbell thus proceeds; "Alderson, B., says: 'The true rule appears to be, that acceptance and delivery under the Statute of Frauds *means* [*sic;* as though the acceptance and receipt were, in effect, one word] *such an acceptance* as precludes the purchaser from objecting to the quality of the goods.' He adds, what, with great deference, is *a better reason: 'the carrier is only an agent for the purpose of carrying;* and here the purchaser himself immediately refused to take the goods.' It was upon this reason that the rest of the court appears to have proceeded."

We would first direct attention to the admissions here, by Lord Campbell and the rest of the Court of Queen's Bench, to two important points on which we have been insisting: 1. That the receipt of the carrier, *quâ* carrier, is not the actual receipt of the vendee, as he "is only an agent for the purpose of carrying" the

10 C. B. N. S. 489, stated and commented on, *infra*. In Saunders *v.* Topp, 4 Ex. 390, it will be noticed that the action was for goods sold and delivered, which, as we have seen, *supra*, p. 370, will always lie when there have been an acceptance and actual receipt of *the whole* of the goods under the statute, as then there has been an actual transmission of the property and possession in the whole of the goods, without which in such case, so that trover can be maintained by the vendee for the goods, the statute is not satisfied.

[1] 15 Q. B. 428.

[2] 9 B. & C. 561, at p. 577.

[3] 14 M. & W. 277.

goods, and of delivering them for the shipper to the consignee, whoever he may be, whether purchaser of the goods or not; and is not the agent of the purchaser to actually receive the goods for him under the statute. He receives for the shipper, and delivers for the shipper; the actual receipt by the purchaser under the statute being the receipt by himself; his servants, etc.

2. When there have been both an acceptance and an actual receipt of the *whole* of the goods to satisfy the statute, both the property and the possession therein and thereof are in the purchaser; and these being both out of the vendor, and actually in the vendee, then the vendee's lien is gone; "for the vendor's lien necessarily supposes that he retains the possession of the goods." Hence, as when there have been both an acceptance and actual receipt of the whole of the goods, the statute is satisfied, and *then* both the property and possession of and in the whole of the goods are in the vendee, it follows, that as, where the lien continues, the statute has not been satisfied, so, clearly, where the right of *stoppage in transitu* continues as to the whole of the goods, the statute is not satisfied either; for the *stoppage in transitu* does not exist where both the property and the *possession* are in the vendee. It further follows, that when the property and the possession in the whole of the goods have actually passed to and been vested in the vendee, and the sale is not on credit, an action will at once lie against the vendee for the price, as for goods sold and delivered; and, on the other hand, the vendee can maintain trover for the goods for their wrongful withholding, against any party, for such wrongful withholding.

These are two very important points settled.

Now, let us see where the mistakes are in connection with the differences between the views of Lord Campbell, Parke, J., and Alderson, B.

First, we must premise, that the acceptance of the statute may be express or implied; and that the *actual* receipt may be manual, constructive, or symbolical. The acceptance is express where the specific goods sold have been selected, agreed upon, assented to, as between the buyer and seller, as the very subject of the particular contract. The acceptance may be implied when there is an actual receipt of the goods, and the vendee unduly retains them, or so deals with them under such circumstances as will warrant a jury in finding that he has assented to them, taken to them, accepted them, as the actual owner. The *actual* receipt may be manual, constructive, or symbolical, in all such cases where those different modes of receiving would be generally good at common law, and which would, in all cases so satisfying the

statute, by a delivery of the whole, in an action for the price of goods as for goods sold and delivered, sustain the alleged delivery.

We think this so far is clear.

In Morton *v.* Tibbett[1] the action was for goods sold and delivered, and goods bargained and sold. The sale was of wheat by sample, under a verbal contract, and there were an acceptance and actual receipt of the sample at M., as part of the bulk, delivered to the defendant, on Aug. 25, 1848, at the time of the sale. The defendant said that he would send one E., on the following morning, to receive "*the residue*" of the wheat, to be taken for the defendant from M. to W. On August 26 E. received the wheat accordingly. On the same day the defendant sold the wheat, at a profit, by the same sample, to one H. at W., where it arrived on August 28, and was tendered by E. to H. on the following morning, when H. refused to take it, on the ground that it did not correspond with the sample. Up to this time the defendant had not seen the residue of the wheat, nor had any one examined it on his behalf. Notice of H.'s repudiation of his contract was given by H. to the defendant, who, on August 30, sent a letter to the plaintiff repudiating the contract on the same ground. The defendant objected on the trial that there was no evidence of acceptance and actual receipt to satisfy the statute. The jury found for the plaintiff, and leave for a nonsuit was reserved, if the court should think either that there was no evidence of acceptance and receipt, or no such evidence as justified the verdict. The court unanimously sustained the verdict.

We think that the decision was correct. And yet we think that the statements of Erle, J., and of Lord Campbell, C. J., during the argument as to the law relating to sale by sample, are also correct. Erle, J.: "The purchaser has a right to object that the bulk does not correspond with the sample, after acceptance within the Statute of Frauds." Lord Campbell, C. J.: "The acceptance ["*and the actual receipt*," omitted as usual] under the statute is [are] merely instead of a memorandum; where there is a memorandum, the purchaser may repudiate the goods if they do not agree with sample."

In this case there were, *first*, the acceptance and actual receipt of a part in the sample, as a part of the bulk, which was sufficient to take the case out of the statute. *Second*, there was an actual receipt of the whole, the delivery to the vendee's lighterman being a delivery to the vendee, there being no question, as the vendor had clearly parted with the possession to the vendee, of the retention, in the vendor, either of a lien or of the right of *stoppage in*

[1] 15 Q. B. 428.

transitu. And, *third*, after the actual receipt of the whole of the goods by the vendee, there was such a dealing by him with the goods as implied an "acceptance" of the whole of them. So that, even had there been, *ab initio*, no acceptance and actual receipt of a part of the goods, there were an acceptance and actual receipt of the whole when the whole of the goods were actually received, and impliedly accepted by the vendee's appropriating them to his own use by making a sale of them.

Instead of this being at all counter to the rule laid down by Alderson, B., in Norman *v.* Phillips,[1] and from which Lord Campbell and the rest of the Court of Queen's Bench purport to dissent, it is in the strictest harmony with it.

Only a part of the sentence then used by Alderson, B., is quoted by Lord Campbell, the latter part, which illustrates the rule, having been omitted. We quote the whole sentence, putting the part omitted by Lord Campbell in italics: "The true rule appears to me to be, that acceptance and delivery under the Statute of Frauds means such an acceptance as precludes the purchaser from objecting to the quality of the goods; *as, for instance, if, instead of sending the goods back, he keeps or uses them.*"

This exactly covers the case of Morton *v.* Tibbett;[2] for there, after the actual receipt of the whole of the goods, the defendant, instead of refusing to accept them, *kept and sold them*. This, in fact, is the very ground upon which the judgment in Morton *v.* Tibbett rests. Lord Campbell first, entirely misapprehending it, dissents from the portion of the part of the judgment of Alderson, B., which he quoted, thus: "If there was such a rule as is contended for, it would be decisive against the plaintiff in this case; for the defendant never had an opportunity of examining the goods sold; there is no evidence that E. was his agent for that purpose; and he had done nothing to preclude him from objecting to the quality of the wheat." And then, in the strictest accordance with the rule as correctly laid down by Alderson, B., Lord Campbell proceeds: "But if there be no such rule, then surely there was evidence to submit to the jury, and to justify them in finding an acceptance and receipt. He specially sent E. to receive the wheat. After the delivery of the wheat to his agent, and when it was no longer in the possession of the vendor, instead of rejecting it, as in other cases, he exercised an act of ownership over it by re-selling it at a profit, and altering its destination by sending it to another wharf, there to be delivered to his vendee. The wheat was then constructively in his own possession; and could such a re-sale and order take place without his

[1] 14 M. & W. 277, 283. [2] 15 Q. B. 428.

having accepted and received the commodity? Does it lie in his mouth to say that he has not accepted that which he has re-sold and sent on to be delivered to another? At any rate, is not this evidence from which such an acceptance and receipt may be inferred by the jury? Upon similar evidence, the finding of an acceptance and a receipt has been sanctioned by very eminent judges."

As will be observed, instead of this being opposed to what we have quoted from Alderson, B.'s, judgment, it is in the strictest possible harmony with it. Lord Campbell then goes on to cite Hart *v.* Sattley,[1] Chaplin *v.* Rogers,[2] and Blenkinsop *v.* Clayton,[3] all stated by us, *supra*, not one of which can be sustained except on the very grounds laid down by Alderson, B., as above quoted. Lord Campbell, too, refers approvingly to what we consider is the wrongly decided case of Bushel *v.* Wheeler;[4] but does so not only in a manner which sustains our criticism on that decision, but in effect to sustain the above-quoted opinion of Alderson, B., as well.

The point in the language of Alderson, B.'s judgment is, that it was used in Norman *v.* Phillips,[5] which was not a case of sale by sample at all, but was an action for goods sold and delivered, where it was claimed that there had been an acceptance and actual receipt of *the whole of the goods*, where it would seem that there had been neither the one nor the other.

The language of Parke, J., in Smith *v.* Surman,[6] quoted by Lord Campbell, is inaccurate, and fairly open to criticism; but not on the ground on which it is criticised by Lord Campbell; whose language, after correctly referring to the *ratio decidendi* of Smith *v.* Surman, is: "A very learned judge, my brother Parke, does unnecessarily add that 'the later cases have established that unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part acceptance.' That there can be no acceptance and receipt by the purchaser while the lien of the vendor remains, is clear enough; for the vendor's lien necessarily supposes that he retains the possession of the goods; but I must be permitted to doubt whether the cases referred to have established the residue of the rule."

The rule itself is wrong, not on the ground stated by Lord Campbell, but on this ground. It is confidently submitted that it

[1] 3 Camp. 528.
[2] 1 East, 192.
[3] 7 Taunt. 597.
[4] 8 Jur. 532; s. c. 15 Q. B. 442, n.
[5] 14 M. & W. 277.
[6] 9 B. & C. 561, 577.

is not correct that there cannot be "*a part acceptance*," under the statute, which does not involve an abandonment of the seller's lien, on that part of the goods (where the sale is not on credit) which, not having been actually received by the vendee, remains in the possession of the vendor; nor, on the other hand, where there have been an acceptance and a receipt of but *part of the goods*, does it follow that such an acceptance and part receipt are not good to take the case out of the Statute of Frauds, even though the vendee is not deprived of the right to object to the quantity or quality of that part of the goods which he has not received.

As has been so often correctly said, the memorandum in writing of the contract, or the giving of something in earnest or part payment is, as are the acceptance and actual receipt of *some part* of the goods, equally potent to make the contract good within the statute; and yet, in neither of these two prior cases, is the lien parted with, or is there a deprivation of the right of examination and rejection of the goods which have not been accepted and actually received; then why should there be any the more such deprivation in the case where there have been but an acceptance and receipt of some part of the goods? Clearly, there is not. But where there have been an acceptance and an actual receipt of *the whole of the goods*, then it is quite another thing; then there is no longer any possession remaining in the vendor upon which a lien can rest; and, on the other hand, the whole of the goods having been accepted, selected, approved, recognized, taken to, as the very subject of the contract, and having been actually received as well by the vendee; having been accepted and received, the whole of the goods have absolutely vested in him, and as the result of such acceptance and actual receipt, there is no place for any opposing action of rejection. And, therefore, it is quite correct, as was really held in Smith *v.* Surman,[1] that, there having been there not even an acceptance and actual receipt of *any part of the goods*, the lien on the one hand remaining intact on the whole of them, and the corresponding right to object also remaining, the statutory requirements had not been complied with to make the contract good, and it could not be enforced. So, thus correcting the mistake of Parke, J., in this respect, it is clear that the one part of the rule animadverted upon by Lord Campbell is equally as correct as the other part which he approves. And Lord Campbell's often-quoted theory that, as regards the *whole* of the goods there can be an acceptance under the Statute of Frauds, which is not an acceptance, is a contradiction in terms, and is absurd.

There is another mistake by the court in Morton *v.* Tibbett,[2]

[1] 9 B. & C. 561. [2] 15 Q. B. 428, 434.

which seems to have entirely escaped the observation of previous writers on this much discussed case.[1] Lord Campbell says: "The acceptance is to be something which is *to precede, or at any rate, to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act* after the goods have been actually received, weighed, measured, or examined."

From the very nature of the acceptance, which, as we have shown, is, in the statute, something entirely different from the "actual receipt," which, in addition to the acceptance, is also required to make the verbal contract good, the fallacy of this proposition is evident. The accepting, as the selecting, the recognizing, the approving, the taking to, as the very subject of the contract, of the goods, can obviously be as well subsequent to the actual receipt as prior to or concurrent with it. In fact, where there have not been a previous acceptance and receipt of some part of the goods, the object very generally of the weighing, measuring, and examining, is to enable the vendee to decide whether he will accept or not. And as both the actual receipt and acceptance must concur to make a binding contract, it follows that, after the actual receipt, where there has been no previous acceptance, the vendee may weigh, measure, and examine, and then accept, or refuse to accept; in the former, completing the evidence of the contract under the statute, and, in the latter, electing that there shall be no contract.

The mistake of Lord Campbell and the rest of the court in this respect, in Morton *v.* Tibbett, and its escape from previous notice, are the more remarkable because the case itself furnishes a refutation of the error, the court having expressly held,[2] that the goods in question had been actually received by the defendant by their delivery to his agent, the lighterman; and that, subsequently, when the wheat "was no longer in the vendor, *instead of rejecting it*, as in other cases," the vendee "exercised an act of ownership over it by re-selling it at a profit, and altering its destination by sending it to another wharf, there to be delivered to his vendee."

So, after the actual receipt of the goods, the vendee had the right to subsequently exercise his right of acceptance or rejection; and, in Morton *v.* Tibbett, according to the holding there, by his very act of dealing with the goods *subsequent* to their receipt, he was held to have subsequently accepted them. It was the *subsequent* dealing with the goods after their actual receipt by his agent,

[1] See Benj. on Sales, §§ 144, 149, 151–156*a*; Blackburn on Sales, 2d ed. 18; Camp. on Sales, 176, 178, 185, 360; Browne on Statute of Frauds, §§ 316*f*, 328, &c.

[2] See p. 439.

the lighterman, that was held to be the acceptance. It is perfectly clear that the acceptance may precede, be concurrent with, or subsequent to the actual receipt.

There is another point in Morton *v.* Tibbett which requires to be made clear. Lord Campbell says:[1] "As the Act of Parliament expressly makes the acceptance and actual receipt of any part of the goods sold, sufficient, it must be open to the buyer to object at all events to the quantity and quality of the residue, and even when there is a sale by sample, that the residue offered does not correspond with the sample. We are, therefore, of opinion that, whether or not a delivery of the goods sold to a carrier or any agent of the buyer is sufficient, still there may be an acceptance and receipt within the meaning of the act without the buyer having examined the goods or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled." This is altogether a most remarkable admixture of truth and error, and shows, as so many other cases decided by that court do, the utter failure of the English Court of Queen's Bench to understand the nature and effect of the clause relating to the acceptance and actual receipt of the seventeenth section of the statute.

While there is here a failure to notice the difference in the effect, which we have pointed out, and which is specially applicable to the facts in Morton *v.* Tibbett, between the rights, respectively, of the vendor and vendee, where the whole of the goods have been accepted and actually received, and where only a part of them have been accepted and received, there is one admission made here by Lord Campbell and the court that is important. It confirms the view we express later in this Part; that is, that where there is a sale by sample, the vendee has only the right to reject the goods, after their actual receipt, where they "do not correspond with the sample." Hence, the purchasing of goods by sample, is, in itself, an assenting to them; an accepting them; and, after actual receipt of the *very* residue, it cannot be rejected.[2]

We here make the following deductions from the law bearing on these subjects which we have discussed: —

1. There must be an acceptance *and* actual receipt to satisfy the statute.

[1] At p. 434.

[2] There are several English cases decided, improperly we think, without this point being noticed. But we think the very latest English cases themselves sustain our view on this point, which we fully consider in a later portion of this Part, and in the next succeeding Part.

2. The acceptance may be expressed or implied; the actual receipt may be either manual, constructive, or symbolical, where at common law these different modes of transmitting the possession of goods to a vendee are generally good.

3. The acceptance, being an approval of the goods, and a recognizing and taking to them as the specific subject of the contract, may be either prior to, concurrent with, or subsequent to the actual receipt.

4. As there must be both an acceptance *and* actual receipt, there may be an acceptance without an actual receipt, or an actual receipt without acceptance; but, as the acceptance may be implied as well as express, — there being the actual receipt, — such an acceptance may be implied where there has been such a dealing with the goods by the vendee, or such *laches* on his part, by undue detention after their receipt, as will raise the implication that he has taken to the goods as owner.

5. As an acceptance and actual receipt of a part of the goods bought is sufficient to make the contract "be allowed to be good," where there is one entire sale of goods, the acceptance and actual receipt of a part of the goods will bind the contract as to the whole of the goods sold, and prevent either buyer or seller from repudiating the contract with reference to any part of the goods so sold.

6. Notwithstanding there may have been an acceptance and actual receipt of *part of the goods* sold so as to make the contract be deemed good, and the sale is not on credit, the vendor may retain his common-law lien and right of *stoppage in transitu* on the residue for the purchase-money of the goods, precisely as he may when there has been a memorandum of the contract in writing, or something given in earnest or part payment for the goods to take the case out of the statute.

7. But where, under the contract, there have been both an acceptance and actual receipt of *the whole of the goods*, the common-law lien (which rests in the possession) and the *stoppage in transitu* (which is a kind of continuation of the lien) are both gone; the property and possession, by the acceptance and actual receipt by the vendee in and of the whole of the goods, being absolutely in him, so that an action will lie against him for the goods as for goods sold and delivered; and he, on the other hand, can maintain trover against any wrongful withholder of the goods.

8. Where there has been a sale of specific, ascertained goods, at an agreed price, this in itself is an assent to an acceptance of them within the meaning of the statute. Yet as there must also, to meet the requirements of the statute, be an actual receipt of

them or of some part of them by the vendee, correlatively involving the delivery by the vendor, notwithstanding the acceptance, the inchoate vendor may refuse arbitrarily (with or without reason) to deliver the goods, and the inchoate vendee may refuse arbitrarily (with or without reason) to actually receive the goods, and there will be no contract "allowed to be good."

9. So, where there has been no acceptance of the goods or of some part of them, within the statute, by the vendee, there may be an actual receipt of them by him, and he may refuse to accept them, and arbitrarily reject them.

10. Where there has been a sale of goods by sample, and either a delivery or not of the sample to the vendee, but, if delivered, not as of the bulk of the very goods sold, though this *may amount* to an acceptance of the goods sold, yet the vendee may arbitrarily refuse to actually receive them (with or without reason) even though they conform to the sample, as there is no good contract without both acceptance and actual receipt of the goods sold or of some part of them.

11. Goods may be sold by sample, and the sample may be accepted and actually received as and for a part of the bulk of the actual goods so sold, so as to make the contract "good;" and yet, if on the actual receipt of the residue of the goods so sold, the vendee finds that such residue do not correspond with the sample, he may reject it: his acceptance of the sample being the acceptance, the approval, the recognition, the assenting to, the taking to, as the very subject of the contract, goods, the very bulk of which is to correspond with the sample, which, as representing the very bulk of the same description of goods, he has accepted and actually received, and only so accepted and received. Hence, —

12. Where goods have been sold by sample, and the sample has been delivered as and for a part of the very bulk of the specific goods so sold, and the vendee either refuses to receive the balance of the goods, or, having received them, claims the right of rejecting them, on the ground that they do not correspond with the sample, and therefore are not the goods purchased by him; in an action against him for the price, as for goods sold and delivered, the question is for the jury, and if they find the goods do correspond with the sample, he is liable; if they find they do not correspond with the sample, he is not liable, for he has never accepted them. But, —

13. Where there has been a sale by sample, whether there have or have not been an acceptance and actual receipt of the sample as a part of the very bulk of the goods sold (Morton *v.*

Tibbett,[1] exemplifying both of these propositions), and there have been an actual receipt of the whole of the goods by the vendee, and a taking to and dealing with the goods by him as owner, this is an implied acceptance of the whole of the goods, and he will be held to have accepted them, as in any other case where, after actual receipt by him of the goods, he has been guilty of *laches* by undue detention of them without signifying to the vendor his refusal to accept them; or, where dealing with them as owner by an actual sale of them after their receipt, he may fairly be presumed to have accepted them.

These propositions pretty well cover the many disputed questions we so far find in the cases, and make clear many of the fallacies which abound in Lord Campbell's judgment in Morton *v.* Tibbett,[2] and in many others of the judgments in the English cases. They will also make clear the sense in which the following from Erle, J., and Lord Campbell, C. J., is accurate, and the very glaring sense in which it is inaccurate. Erle, J.: "The purchaser has a right to object that the bulk does not correspond with the sample, *after acceptance*, within the Statute of Frauds." Lord Campbell, C. J.: "The *acceptance* under the statute is merely instead of a memorandum; where there is a memorandum the purchaser may repudiate the goods if they do not agree with the sample."[3]

In Meredith *v.* Meigh[4] goods of the value of £10 and upwards were verbally purchased, and were ordered to be shipped to the A. Co. at Liverpool. The A. Co. were carriers by inland navigation to the residence of the vendee. The goods were shipped on board the M., a vessel selected by the vendor; a bill of lading was signed making the goods deliverable to the A. Co. at Liverpool, and was forwarded to them, of all which the vendee had notice, and did and said nothing. Then the goods perished at sea on their voyage to Liverpool; and the vendee refused to have anything to do with them. In an action for goods sold and delivered, the judge (Crompton, J.) directed a verdict for the defendant, reserving leave to enter a verdict for the plaintiff, in event of the court being of opinion that there was any evidence of acceptance and receipt on which the jury would have been justified in acting. The court sustained the verdict; but expressed the opinion that had the bill of lading been sent to the defendant, and he had dealt

[1] 15 Q. B. 428.

[2] 15 Q. B. 428.

[3] Morton *v.* Tibbett, 15 Q. B. 428, 431. The correction is: After acceptance and actual receipt *of the whole*, the vendee cannot object, so as to take the case out of the exception to the statute. After acceptance and actual receipt *of a part*, he may repudiate the residue if it be different from, and therefore not a part, of the goods which he has accepted and actually received.

[4] 2 E. & B. 364.

with the goods as owner, there would have been, in effect, a symbolical delivery of the goods, and an implied acceptance of them, Coleridge, J., expressing the opinion that had the A. Co. been the vendees there would not have been even by them an acceptance or a receipt of the goods.

The rule we deduce from Meredith *v.* Meigh,[1] coupled with Morton *v.* Tibbett,[2] is, that although the carrier, as such, has no power to accept or actually receive the goods to take the case out of the statute, yet where the bill of lading in favor of the vendee is sent to and received by him, and he treats the goods as owner by selling them, assigning the bill of lading, his receipt of the bill of lading, and selling the goods under it, will be treated as a symbolical receipt of the goods, and an implied acceptance of them. In this case the right of *stoppage in transitu* in the original vendor is gone,[3] and the property and the right to the possession are entirely out of the vendor. To make an acceptance and actual receipt of the part of the goods meet the requirements of the statute, obviously there must be an acceptance and an actual transfer of the possession of such part, so that the possession is taken entirely out of the vendor and vested in the vendee. Equally so, where reliance is placed on the acceptance and actual receipt of the whole of the goods, must there be not only the acceptance of them, but, to make the actual receipt, an actual transfer of the possession of the whole of the goods, such possession clearly must be absolutely out of the vendor and in the vendee; and, hence, so long as the vendor's lien or right of *stoppage in transitu* continues on the whole of the goods, the possession is not absolutely in the vendee, and, therefore, there has been, in such case, no *actual* receipt by him.

The Court of Exchequer in Hunt *v.* Hecht[4] dissented from some of the *dicta* of the court in Morton *v.* Tibbett,[5] the unsoundness of which we have pointed out; but agreed with the view we have taken as to the *ratio decidendi* of that case. Martin, B., said: "In my opinion an acceptance to satisfy the statute must be something more than a mere receipt. It means some act done after the vendee has exercised or had the means of exercising his right of rejection." In this case the defendant agreed to purchase of the plaintiff bones of a particular kind, to be separated from a heap of various bones, and gave the plaintiff a note addressed to a wharfinger to receive and ship the bones; and the plaintiff accord-

[1] 2 E. & B. 364.
[2] 15 Q. B. 428.
[3] See Dracchi *v.* Anglo E. N. Co., L. R. 3 C. P. 190; Wait *v.* Baker, 2 Ex. 1; Hare *v.* Dresser, 7 H. L. Cas. 290; Jenkyns *v.* Usborne, 7 M. & G. 678; Kingsford *v.* Merry, 1 H. & N. 503.
[4] 8 Ex. 814.
[5] 15 Q. B. 428.

ingly sent to the wharf some bones, which, on inspection, the defendant refused to accept, he having "found that they did not correspond with his order," and, therefore, he clearly, in no proper sense of the term "accept" in the statute, had accepted them. It was held that although this was a receipt of the goods by a person authorized by the defendant to receive them, there was no acceptance.

There can be no doubt, we think, of the entire correctness of the holding in Hunt *v.* Hecht;[1] but there is again, in this case, language used by some of the judges that is very liable to be misunderstood. For instance, referring to acceptance under the statute, Pollock, C. B., says: "A person cannot accept a commodity which is not in a condition to be accepted by reason of its requiring to be separated from a larger bulk. If the contract be for the purchase of a certain quantity of flour or wheat, part of a larger quantity, *there can be no acceptance* until it is measured and set apart."

And Alderson, B., uses language very much of the same character. If by this they mean that there cannot be an acceptance and actual receipt of goods, within the exception in the seventeenth section of the statute, under a verbal sale, where nothing has been given in earnest or part payment to bind the bargain, where the goods sold have not been measured or separated from a larger bulk, then, we think, they entirely misstate the statute. The language they use can only be explained on the ground that they, in this instance, lost sight of the fact that there may be an acceptance and receipt under the statute which may make a verbal contract "good," so that it can be enforced, and yet not such an acceptance and receipt as will pass the property to the vendee in the whole of the goods purchased.

There may be wheat or flour or oil in bulk, a specific quantity of which may be sold by verbal contract, and if a part be accepted and actually received the contract is "good," though there be no separation of the mass of the goods sold from the general bulk. Or there may be a sale of a specific quantity of goods by sample, where the goods sold are not only part of a larger bulk, but where the vendee may not even have seen them, and clearly, on this point, if the sample be delivered, accepted, and received, as and for a part of the bulk of the goods sold, this is sufficient to make the contract good, and to sustain an action for goods bargained and sold, should the vendee refuse to receive the balance of the goods which, at the time of the acceptance and actual receipt of the part, were unmeasured and unseparated from a greater bulk. The accepting to satisfy the statute and the accepting (or appro-

[1] 8 Ex. 814.

priating) to pass the property in specific goods may be two very different things, and it is from the fact that the term "accept" has different meanings that so much confusion has arisen in the construction of the statute.

In Holmes *v.* Hoskins,[1] the defendant verbally agreed to purchase of the plaintiff some cattle then in his field. After the bargain was concluded, the defendant felt in his pocket for his check-book in order to pay for the cattle; but finding he had not got it, he told the plaintiff to come to his house in the evening for the money. It was agreed that the cattle should remain in the plaintiff's field for a few days, and that the defendant should feed them with the plaintiff's hay, which was accordingly done. The reporter's note of this case is: "Held, that there was no evidence of an acceptance of the cattle to satisfy the Statute of Frauds." There was a very clear acceptance of them as the specific subject of the contract; but there was no actual receipt, — the possession, with the lien attached, being in the vendor. Parke, B., here well says: "In order to satisfy the statute, *there must be an acceptance, and an actual or constructive delivery.* Now, in this case there was no actual delivery; and, therefore, to entitle the plaintiff to recover, there must be such a dealing with the cattle by the defendant, as owner, that the plaintiff would lose his lien. But it is clear that the plaintiff never meant to part with the cattle until the price was paid; and there is no ground for holding that the mere giving permission to feed the cattle changed the possession;" *i. e.*, constituted an actual receipt.

In Bigg *v.* Whisking,[2] it was held, following Eliott *v.* Thomas,[3] that where, on the same day, different lots of timber were bought at different places, and at the close a memorandum of the different lots was made out by the vendor for the vendee, the transaction was entire, and an acceptance and actual receipt of a part took the contract as to the whole out of the statute.

Lord Campbell, C. J., in Parker *v.* Wallis,[4] refers to the language he used in Morton *v.* Tibbett,[5] the inaccuracies in which we have pointed out, and says: "To make an acceptance, it is not necessary that the vendee should have acted so as to preclude himself from afterwards making objection to the quality of the article delivered; but he must have done something indicating that he has accepted part of the goods and taken to them as owner."

The law is clear, notwithstanding the confusion in the cases. If there have been an acceptance and actual receipt of the whole

[1] 9 Ex. 753.
[2] 14 C. B. 195.
[3] 3 M. & W. 170.
[4] 4 E. & B. 21.
[5] 15 Q. B. 428.

of the goods, the vendee has no further right to object, so far as the Statute of Frauds is concerned. If there have been an acceptance and actual receipt of a part of the goods sold, he is also precluded — outside of the question of fraud — from objecting to the balance of the goods *he has bought;* but he is not precluded from refusing to receive for such balance goods which he has not bought; as, if the sale has been by sample, and the sample has been accepted and actually received as a part of the goods so bought, he is bound to receive the balance of the goods he has bought; but he is not compelled to receive and accept the balance of the goods if they are not according to the sample; because they are not the balance of the goods he bought.

In Parker *v.* Wallis[1] there was an actual receipt of the whole of the goods; but as there was a handling of the goods by the vendee after their receipt, it was held to be a question for the jury as to whether such acts were such a taking to the goods as owner as would constitute an acceptance. The evidence of acceptance in the case, we think, outside of the question as to the purchase being one of specific goods, not considered in the case, was little if any more than the merest *scintilla.*

Where the goods have been accepted and actually received under a verbal contract, the sale is consummated, and it is no longer in the power of either of the parties, without the consent of the other, to vary or rescind the contract. As we have shown, where both the property and the possession have passed in the whole of the goods, there is nothing in them left in the vendor; and, on the other hand, by the acceptance and receipt, the verbal contract, under which the property and possession in and of the goods have passed to the vendee, is absolutely fixed, and parol evidence is then let in to prove what the contract is; and what the contract is, is, under such evidence, a question for the jury.

This principle is well illustrated by Tomkinson *v.* Staight,[2] where, on the verbal sale of a specific piano for £15 10*s.*, the piano being thus (as we have previously intimated would be the effect) accepted as the very subject of the sale, it was actually received by the vendee, who, after receipt of it, claimed to hold it on different terms from those on which it was sold, accepted, and received. The court very properly held that he could not do so; that the question as to what the contract was under which the piano was accepted and received was for the jury; and as they had found that the contract was as it was claimed by the plaintiff to have been, the verdict was properly for him. Cresswell, J.,

[1] 5 E. & B. 21.

[2] 25 L. J. N. S. C. P. 85; S. C. 17 C. B. 697.

very correctly said: "After the finding of the jury, we must take it that the contract was for the sale and delivery of the goods on the defendant's premises for the purpose of *making him the owner*.[1] He was told of the delivery, and assented in such a manner as to make him owner, and he insists on keeping the goods as owner; and he cannot say that he did not accept [? or receive] them on the true terms of the bargain. He disputed the terms on which he became owner, which he was at liberty to do; but the jury have found against him on that question, and he is bound by their finding."

The case, on this particular point, is one of first instance; but, as we have pointed out in the note below, it is in strict accord with the construction of the statute we have contended for throughout this Part; and, under such construction, it is one of the plainest and simplest cases possible. The mind of Jervis, C. J., wavered considerably during the discussion of the case; but he ultimately concurred with the rest of the court. In the case in question, so long as the contract remained *in fieri*, the defendant was not bound by it; and though by his act of buying the specific piano at an agreed price, the piano was, as we have claimed, selected, accepted, approved, recognized, and taken to as the very subject of the sale, yet the contract would not "be deemed good" until, notwithstanding this acceptance, there had been an actual receipt of it. Hence had he, *prior to the actual receipt*, refused to receive it on the original terms named, it was in his power then to have rescinded the contract, and there would have been no "good" contract. But having, by his acceptance and actual receipt, taken to the goods as owner, the contract was finally fixed and "deemed good" under the statute; and he was too late then, of his own mere motion, to vary or rescind the contract, which no longer remained *in fieri*.[2]

[1] This is exactly as we have contended with reference to the effect of the acceptance and actual receipt by the vendee *of the whole of the goods sold*: "it makes him the owner;" *i. e.*, the property and actual possession in the whole of the goods passing to the vendee, he becomes the absolute owner, the goods being discharged of any lien or right of *stoppage in transitu*; and both parties being precluded, without mutual assent, from varying or rescinding the contract, which has been consummated by the acceptance and actual receipt of the whole of the goods.

[2] In the second edition of Blackburn on Sales, p. 24, it is said, by the editor of that edition, but not by Lord Blackburn, that if the vendee accepts the goods, but *says at the time* that he accepts them on other terms than those on which the vendor is willing to deliver them, that is a sufficient acceptance. For this Tomkinson *v.* Staight, 17 C. B. 698, is cited. The case is not authority for any such proposition as the above, which is not law. The goods in that case were specific, ascertained goods, — a piano, which was accepted, assented to, approved, under the particular contract, by virtue of the contract itself, as in Cusack *v.* Robinson, 1 B. & S. 299, Marshall *v.* Green, 1 C. P. Div. 35, and numerous other cases, as the subject of the contract, on the terms on which the minds of the parties to the sale then met. *After the actual receipt of the piano*, the vendee claimed to hold it on

Marvin *v.* Wallis,[1] while a case of absolute simplicity itself, thoroughly sustaining our whole contention as to the proper construction of the terms "accept and actually receive" of the statutes, is an important case; showing, as do so many of the cases in the English Court of Queen's Bench, how these words have been distorted and misunderstood. Lord Campbell, C. J., seeming to be fairly despairing of obtaining any clear, reasonable, uniform construction of the act, exclaimed: "I must say that, giving as I do full effect [?] to the statute while it remains, I shall rejoice when it is gone [!]. In my opinion it does much more harm than good. It promotes fraud rather than prevents it, and introduces distinctions which, I must confess, are not productive of justice."[2]

This outburst of Lord Campbell was simply the result of the continuous failure of himself and so many of the judges, in perpetuity, of the English Court of Queen's Bench, to appreciate the meaning of the terms "accept and actually receive" of the statute.

Under the principles we have laid down in this Part, Marvin *v.* Wallis[3] has only to be fairly stated, for its simplicity to appear. The jury in the case found that there was a verbal contract for the sale of a specific horse for a price above £10; that, after this had been agreed upon, and the contract thus far completed, relat-

terms different from those under which he had accepted it; recognized, approved, assented to it, as the subject of the particular contract of sale, and it was very properly held that he could not do so. The mistake has arisen evidently from the failure to treat the acceptance of the vendee as an entity apart from the actual receipt, which is also necessary, as well as the acceptance, to furnish the statutory evidence of the verbal contract made between the parties to the sale.

[1] 6 E. & B. 726.

[2] When Lord Campbell indulged in these very unwise, not to say petulant, exclamations, it did not occur to him that the very evils which the statute of frauds was designed to correct, and which, in a great measure, it does correct, would, by its repeal, be again restored. When there is an intelligent construction of the statute, we know of no branch of law where the decisions should be more scientifically uniform than under this statute. To repeal the statute would be to let in mere verbal testimony, — with the conflict therein which so distinguishes it, — unchecked by the further evidence of care, deliberation, action, which the statute wisely requires in that vast number of cases where just such care, deliberation, action, to prove the contract, should be insisted on. As it is, the verbal testimony has enough influence in the matter, as by it the terms of the contract have, necessarily, to be established; but then, as in other cases, leaving these for the consideration and determination of the jury. But sweep away the statute of frauds, and then, in very many cases, nothing but the mere verbal testimony would be left; unless, indeed, it were enacted, as in the 4th section, relating to the sale of lands, that a memorandum in writing should be required in every contract, which the wise framers of the statute saw would virtually paralyze trade. And even, under the 4th section, it was found so absolutely impossible to literally carry out its requirements in this respect, that the doctrine of "part performance" had to be let in, and that of "resulting trusts" had to be applied. A repeal of the statute would be to increase litigation a thousand-fold, and to put a premium on the fraud and perjury which the statute, in requiring other evidence in addition to the mere verbal testimony, was designed to prevent, and which it does thereby greatly succeed in so doing.

[3] 6 E. & B. 726.

ing to the ascertained, specified horse, the parties then agreed that the vendee, as owner, should lend the horse to the vendor, who was to keep the horse, not as unpaid vendor, but as gratuitous bailee of the horse, for the vendee, as such owner. Here, then, was the accepting, the selecting, the approving, the recognizing, and the taking to of the horse as the specific subject of the verbal contract; and there was not only this accepting of the horse, as the subject of such contract, but there was "the actual receipt" of the horse by the vendee, in the possession as owner being transferred by the vendor to the vendee; the constructive receipt (which, as we have seen, is sufficient, as at common law, to make an *actual* receipt) and possession being then by and in the vendee; the vendor's possession thereafter being the possession of the vendee as owner, discharged of all lien, — the possession, as owner, being no longer in the vendor, but only in him as the servant or bailee of the vendee.

What can be clearer than this? The statute is fully satisfied. The bailee has no lien for the price; cannot pass the property in the horse to any one else; goods sold and delivered will lie for the price; trover for the possession; and neither vendor nor vendee can, without the consent of the other, rescind the contract, which has been finally closed under the verbal agreement, the acceptance, and the actual receipt, — the latter made such by the actual transmission of the property and possession to the vendee, as owner, exactly as in the previous case of Elmore *v.* Stone;[1] the facts, in the one case as in the other, showing that the vendor, in holding the horse in each of the cases, did so, not in his capacity of owner, with a lien attaching; but simply — deprived of his lien with the deprivation of possession as owner — as the bailee of the owner; the bailee's possession being the possession of the owner, the purchaser of the specific horse; assented to and accepted as such.

And yet the case, by the expressions of Lord Campbell, C. J., and Coleridge and Erle, JJ., is made to appear as one which had given them much trouble, and had involved them in much doubt. Erle, J., says: "I believe that the party who inserted the words had no idea what he meant by 'acceptance:' that opinion I found on the everlasting discussion which has gone on as if possession, according to law, could mean only manual prehension."

This simply arises from the failure to observe that when the terms "accept and actually receive" are used, *accept* is not used in the sense of *receive* (either as a matter of "manual prehension," or otherwise), making the passage mean "*receive and*

[1] 1 Taunt. 458.

actually *receive;*" but that it is used in the entirely different sense which we have, in this Part, so often pointed out.

Again, the term is "actually receive;" not *manually* receive; and an *actual* receipt, at common law, as well as under the statute, may be either manual, constructive, or symbolical; and, as far as the receipt or transmutation of the possession is concerned, be, in the one case as in either of the others, equally *actual.*

Thus, when Coleridge, J.,[1] says: "The Statute of Frauds requires an actual receipt, which implies delivery *and acceptance;*" we say, unhesitatingly, in reply, it implies nothing of the kind, in the sense in which the term "accept" is used in the statute.

Receipt implies *delivery*, of which, under the statute, the one is the correlative of the other. Receipt, under the statute, does not imply acceptance, as, to make the contract good, the vendee, expressly, must accept *and* receive; the acceptance alone being not sufficient, by the very words of the statute, which requires an actual *receipt* as well as the no less *actual* acceptance; whether the latter be express or implied, and the former, as at common law, manual, constructive, or symbolical.

Thus, it is of the term "receipt," not of "acceptance," that Erle, J., should have said: "It may mean manual prehension, or it may mean a handing over to a servant." In this case, there having been an acceptance, and the question turning upon the point, as to whether there was an actual receipt or not, the language of Erle, J., applied to that point, is accurate: "But the question is, whether there has been an exercise of the right inconsistent with any supposition but that of ownership; whether there is an actual sale, and an act which is inconsistent with anything but ownership. When you apply that here, you have the finding of the jury that there was an actual sale,[2] and that the purchaser assumed to be in actual possession. He permitted the other party to retain the horse. All, indeed, passed by word of mouth; but to my mind, it is a most decisive case of possession [*i. e.* actual receipt], and one in which the vendor has lost his claim to lien."

Crompton, J., distinguishes a little more clearly the acceptance and the actual receipt, thus: "There is no question as to the identity; there is a sale of the horse,[3] and *then* what amounted to a

[1] Father of the present Lord Chief Justice.

[2] This, called "an *actual* sale," really covers the no less actual *acceptance* required; as there is the accepting, the selecting, the recognizing, the approving, the taking to, as the very subject of the actual sale, at an agreed price, the specific, ascertained subject of the sale, — the horse. Hence, is the clear deduction, when there is "an actual sale" of specific, ascertained goods, that very actual sale is itself the acceptance of the statute.

[3] This again shows that this — the assenting to the specific horse — fixes the *acceptance* of the identical horse as the

loan by the vendee; and, under that loan, the vendor kept possession of the horse. That is a possession by the vendee. The case is analogous to that of goods warehoused. I go to the warehouseman with the seller, and say to him, 'You now hold these goods for me;' [1] the warehouseman then becomes the bailee of the purchaser, and the possession of the warehouseman becomes that of the purchaser. Mr. Mellor says, and he would succeed if he could make out his proposition, that in no case can the vendor, for this purpose, be the agent for the vendee; but that, I think, is not law. Elmore *v.* Stone [2] shows that. In the one case we have a bailment of a description different from the original possession; here we have a loan; but in each case the possession of the bailee is the possession of the bailor. It would be dangerous to distinguish between such cases." The verdict for the plaintiff was very properly sustained.[3]

In our chronological examination of the cases, we simply take them up in detail; and we find that case after case only the more firmly establishes as correct the principles we have enunciated in this Part.

The next case to be examined is Taylor *v.* Wakefield.[4] Here there was a verbal agreement for the sale of goods for upwards of

very subject of the sale. All that is further required to complete the sale is the actual receipt, which, in this case, followed the acceptance.

[1] Here, mark, treating the actual receipt of the statute just as an actual (not necessarily *manual*, here constructive) receipt at common law.

[2] 1 Taunt. 458.

[3] While Marvin *v.* Wallis, 6 E. & B. 726, was correctly decided, there is, as we have pointed out, much in the reasoning of the judgment, which is unsound. The following from Coleridge, J., is furnished as another such instance. Following the fallacy, to which we have previously referred, involved in the following, "The statute of frauds requires an actual receipt, which implies delivery *and acceptance*," Coleridge, J., adds: "It is admitted that, if there be an actual visible possession in the vendee for a single moment, that is enough; the question cannot turn on the time. It must also be admitted that it is enough if a third party has such possession for the vendee." This, then, might be fairly said to mean: Acceptance, as well as the reception, and its correlative, delivery, are implied by the actual receipt, which the statute requires; hence, where there has been "an actual visible possession in the vendee for a single moment, it is enough," as it is "if a third party has such possession for the vendee." This, then, would make the actual receipt alone, even "for a single moment," by the vendee or by some one for him, fulfil the requirements of the statute; the absurd result of confounding the acceptance, which is one thing, with the actual receipt of the statute, which is quite another. But myriads of cases correctly hold that the vendee may not only be in "actual, visible possession" for very many moments, but yet be able to reject the goods, and repudiate the contract. The actual, visible possession being in the vendee does not vest the title in him, under such a contract, unless the possession is in him, as owner; and this only, under the statute, can be where there has been not only an actual receipt by the vendee as such, but, also, an equally actual acceptance by him, in his capacity as such vendee. It is by just such unsound reasoning as that of Coleridge, J., in Marvin *v.* Willis, 6 E. & B. 726, 733; and of Lord Campbell in Bushel *v.* Wheeler, 8 Jur. 532; and in their having failed to appreciate the difference between the acceptance and the actual receipt of the statute, that the construction of the statute has been involved in the confusion which we are endeavoring, we trust successfully, by this protracted and exhaustive investigation, to clear away.

[4] 6 E. & B. 765.

£10, which were in the possession of the vendee, as tenant of the premises where the goods were; the sale being on the terms that the goods should become the property of the vendee at a later date, on payment of the purchase-money. Before the money was paid, which, however, was tendered by the vendee, the *inchoate* vendor repudiated the contract. Here, the vendor had never parted with his lien or his possession as owner, the possession being in the vendee, as tenant for the owner, and he (the vendee) never got possession of them as owner; before their actual receipt, as owner, the contract having been repudiated by the vendor. The court held, following Edan *v.* Dudfield,[1] and Marvin *v.* Wallis,[2] that, under the Statute of Frauds, the contract was not "good." Crompton, J., who had, on the whole, a better appreciation of the meaning of the statute, than his colleagues of the Queen's Bench, said: "When goods are sold by parol, and nothing remains to be done before the delivery, if the goods are already in the hands of the vendee, he may *take to them* under the contract, and it is an acceptance and receipt by the authority of both parties. It is the only way in such cases in which there can be a delivery. The contract is binding as soon as the bailee changes his character and holds as owner. But then it appears, on the facts here, that by the contract there was to be no delivery till the price was paid; and it appears that, when the price was tendered, before any possession as owner was, or under the contract could be taken, the vendors refused the money, and declared the contract not binding. If we held that it was sufficient to tender the money and take possession afterwards, it would be, in effect, holding that the contract was binding before the possession was taken; for, unless it was, the subsequent taking of possession was tortious; and it is admitted on all hands that a tortious taking possession cannot make the contract binding." The decision of the court below that there was evidence for the jury of an acceptance and actual receipt, was reversed. It is a sound corollary from this well-decided case that the delivery and the actual receipt are, as we have repeatedly pointed out, correlative terms under the statute; the vendor having, in effect, to be a party to the actual delivery, as the vendee has to the actual receipt, to satisfy the statute.

Gardner *v.* Grout[3] establishes another of the propositions we have stated in this Part. Here, after a verbal sale of specific goods for more than £10, samples as of the very bulk were delivered and actually received by the vendee, weighed and charged to

[1] 1 Q. B. 302.
[2] 6 E. & B. 726.
[3] 2 C. B. N. S. 340.

him as a part of the goods sold. It was held, following Hinde *v.* Whitehouse,[1] that there had been an acceptance and receipt of a part of the goods. But in Simonds *v.* Fisher,[2] where there had been a delivery and receipt of samples, but not as a part of the bulk, Wightman, J., nonsuited the plaintiff on the ground that there had been no acceptance and actual receipt of a part of the goods.[3]

A. in Coombs *v.* The Bristol & Exeter Ry. Co.,[4] verbally agreed to buy of B. all the whalebone he could procure at a certain price, to be sent by a particular railway, A. agreeing to pay the freight. Some whalebone, to an amount exceeding £10, having been delivered at the railway station by B., consigned to A., and having been duly invoiced to him, was lost in the transit. In an action by A. against the railway company, for the loss of the whalebone, it was held, following Norman *v.* Phillips,[5] that the receipt of the railway was not the actual receipt of the vendee, and that there was no acceptance of the goods, inasmuch as the vendee had the right of rejecting them after inspection; and, therefore, that the plaintiff could not recover.

As there was here the purchase of an ascertained article, "all the whalebone he could procure," at an agreed price, there would seem to have been good ground for the plaintiff's claim that there had been — though the receipt of the carrier is not the actual receipt of the vendee — at least an acceptance by the vendee; and had the whalebone been actually received by the vendee, we doubt whether, after that, after examination, he would have had the right of rejecting the whalebone, as it was exactly the article which he had purchased; the specific subject, which he had accepted (not received) as the very subject of the contract.

We think that closely analogous to this, on the question of acceptance, would be the case of verbal purchase by a vendee, of all the flour in a warehouse, or all the goods in a store, at an agreed price; though in these cases the goods had not been subjected to special examination. Of course, in these cases, the vendee might refuse to receive the goods, and there would be no good

[1] 7 East, 558.

[2] Cited in Gardner *v.* Grout, 2 C. B. N. S. at p. 342.

[3] Simonds *v.* Fisher, was but a *nisi prius* case, before Wightman, J., in which a rule *nisi* to set aside the nonsuit was granted, but was never argued. Using the usual language of so many of the English cases, it was claimed that the acceptance and receipt of samples of wine purchased by the defendant was "*a part acceptance*" of the wine. As it was a sale of specific wine by sample, we think that, in itself, was an assent to the particular wine as the very subject of the sale; and, therefore, was an acceptance, or, as it is called in the case, "a part acceptance" of it. But, as there was no actual receipt of any part of the wine which was so accepted, the exception in the statute was still unmet, and the nonsuit was clearly right on the ground that there was *no part* receipt, not on the ground that there was no "part acceptance." See, *post*, further on the subject.

[4] 3 H. & N. 510.

[5] 14 M. & W. 277.

contract. But we think the purchase of specific, ascertained goods is an "acceptance" of them; a recognizing, approving, assenting to, taking to them as the very subject of the contract, as it would have been, at common law, before the statute.

With this view, it would seem, also, logically, that there would be no escape from holding, where there has been a sale of specific goods, by sample, and there has been no delivery of any part of the goods, the buying the goods by sample is itself an acceptance of them under the statute, as the very subject of the sale. And if, on their actual receipt, they should conform to the sample, so as to be the very subject of the contract, no further *acceptance* would be required to satisfy the statute, and the vendee would not then have the right, after their actual receipt, arbitrarily to reject the goods, as he would have had even after their actual receipt, if there had not been the previous acceptance of them.

It is to be regretted that, from the manner in which the terms "accept" and "actually receive" of the statute have been confounded, as though the latter involved the former, in many cases where the force and effect of the term "accept" should have been considered, the peculiar signification of the word as not being necessarily involved in receiving has been allowed to pass without notice. The conclusion would, however, seem to be that the acceptance of the statute is, as it was at common law, necessarily implied or involved *in every purchase of specific goods* in which at common law the property would pass by virtue of the sale to the vendee.

If this deduction is correct, and we think it is, it is but concluding, as we have in effect all along in this Part contended, that the accepting of the statute is nothing more than the selecting, specifying, recognizing, assenting to, fixing upon, as the particular subject of the sale, the goods agreed upon as such subject of sale by the vendor and vendee, the minds of the parties being *ad idem* with respect to the particular goods which are the subject and very object of the actual sale.

When this selecting, specifying, recognizing, accepting, assenting to, taking to of the goods as the subject and object of the sale is fixed, then, in the words of Heath and Chambre, JJ., in Kent *v.* Huskinson,[1] there is such an "acceptance as is an affirmation of the particular contract made;" and when there is, in addition to this, the actual receipt of the statute, then you have the position, as named by Alderson, B., in Norman *v.* Phillips,[2] where the purchaser has precluded himself from objecting to the quality of the goods.[3]

[1] 3 B. & P. 233.
[2] 14 M. & W. 277, 283.
[3] If this principle is sound, as we think it is, there are, of course, cases to be found where the distinction between the acceptance and actual receipt of the statute has

not been kept in view, and among them are some of the cases which we have examined, which will be found not to have been correctly decided. In Smith *v.* Surman, 9 B. & C. 561, the terms "acceptance" and "actual receipt" are hopelessly confounded. In that case there was clearly no actual receipt; and, independent of this, there seems to have been no such selection or recognition of the particular goods as the defined object of the sale to amount to an acceptance of any specific goods. The trees in that case were standing, and they were, clearly, not the object of the sale, there having been no acceptance of any part of them whatever to preclude an objection to their quality, or even to form the basis of any judgment of quality. So, in Johnson *v.* Dodgson, 2 M. & W. 653, the term 'acceptance" is used, where merely "receipt" is meant. In that case, as the jury found that the goods did conform to the sample by which they were sold, thus, in effect, finding that there was a selecting, an approving, an assenting, a taking to of the very goods which, by sample, were actually bought; and, therefore, an accepting of them as the subject of the contract, the defendant would seem, in that sense of the word accepting, to have accepted them within the exception in the statute. But the delivery was to the carrier, and not to the defendant; so there was no actual receipt by him, as he refused to receive the goods, and the acceptance, alone, was not, therefore, sufficient. The case of Curtis *v.* Pugh, 10 Q. B. 111 (stated by us *supra*), which, while we think it is a correct decision on the question of acceptance, where, as was assumed in that case, there had been no previous acceptance, or where the facts connected with the sale did not, in themselves, constitute the acceptance of the statute, is, we think, as we have already intimated, on the facts in that case a very doubtful one. In this case there was a specific purchase of a specified quantity of Cox's best glue. After the glue had been delivered to the defendant and actually received by him, he claimed the right to reject it. The jury found that the glue was exactly what he had purchased; and hence it was the identical article which he had selected and accepted as the very subject and object of the sale. Notwithstanding this, he could have refused to actually receive it, and there would have been no good contract within the statute. But, after actual receipt of it, we think it was too late then for him to reject it on the ground that it was not the article that he, by his specific purchase, had accepted as the very subject and object of the sale; when, as by the finding of the jury it was shown to be, just such subject and object as he, by his specific purchase, had so accepted. The acceptance in Saunders *v.* Topp, 4 Ex. 390, of the specific sheep agreed upon as the subject of the sale, was made perfectly good by the selecting them; thus making specific sheep the very subject of the sale. Parke, B., in this case, referring to the holding in Baldey *v.* Parker, 2 B. & C. 37, says: "That case is an authority to show that the selecting particular articles does not amount *to a receipt* within the statute, but is merely an agreement that the property in the specific articles shall pass." And we think that the very word "accept" in the statute is used precisely in this sense, and that *the acceptance*, independent of the actual receipt also required, is just that acceptance which existed at common law in every case where there was "an agreement that the property in the specific articles shall pass;" or where, as (to again quote Parke, B., in the same case), "at common law, the property would pass by the contract of bargain and sale," in "the specific articles." (The term "acceptance," under the statute, goes even further than this, as in cases where the acceptance and actual receipt of a part of the goods will take the case out of the statute, so that the contract may be enforced, even though the property in the specific goods has not passed, so that an action as for goods sold and delivered would lie.) So, in Hunt *v.* Hecht, 8 M. & W. 814, although there was an actual receipt of the goods, because there was no "acceptance" of them, the articles received not corresponding with the order, and, therefore, they were not the goods which were bought at all, not the specific subject of the purchase, and no *acceptance* of them as such subject so as to cause the property in them to pass at common law, independent of the statute; and it was held that there was no good sale. And in Simonds *v.* Fisher, cited in Gardner *v.* Grout, 2 C. B. N. S. 340, 342, there was a completed sale of specific goods, by sample, at an agreed price, without the samples being given to the vendee as a part of the bulk of the actual goods sold. The statement of the case is, as we have seen,

We proceed to examine the later authorities.

The confusion of the Court of Queen's Bench on the subject still continues. In Hart *v.* Bush,[1] the defendant, a wine merchant

[1] E. B. & E. 494.

at Lancaster, bought from the plaintiff, a wine merchant in London, a hogshead of "Superior Jersey Brandy" for £37 10*s*. The order was for this specific brandy, given verbally to the defendant's traveller, the defendant directing that the brandy should be sent to him from the G. wharf at London, which appeared to be the only wharf in London whence goods were shipped for Lancaster, and from which goods had previously been sent by the plaintiff to the defendant. The brandy purchased was sent by the plaintiff to the wharf, and the wharfinger shipped it in a vessel for Liverpool *en route* for Lancaster. The vessel seemed to have been selected by the wharfinger, and was lost between London and Liverpool. The defendant refused to pay for the brandy. In an action for the price, the defendant's counsel[1] contended that there was "*no receipt*" of the brandy so as to satisfy the seventeenth section of the statute. A verdict was found for the plaintiff, with leave reserved for a nonsuit, or verdict for the defendant. On the argument, the terms "receipt," "acceptance," "actual acceptance," and "delivery," are all used as though they meant but receipt; and the argument, in effect, was, agreeing with the defendant's contention in the court below, that the delivery at the wharf was not the actual receipt of the defendant. The court held that it was not, the judgment of Lord Campbell, C. J., not in any way touching the question of acceptance, but that, rather, whether the delivery at the wharf was a receipt by the vendee. But on the argument Lord Campbell does use the word "acceptance," and, whether accidentally or intentionally (and which of these seems just slightly doubtful), we think, in this instance, he uses it correctly.

Referring to Morton *v.* Tibbett,[2] he says: "In Morton *v.* Tibbett the vendee took a sample, and directed the destination of the goods, — *that was clearly evidence of acceptance.*" We think it was. That which in Morton *v.* Tibbett was held to be evidence of the actual receipt, was that, *after* taking the sample, and directing the destination of the goods (showing an acceptance of the goods to satisfy the statute, which became conclusive if the bulk corresponded with the sample), he treated the goods as his own by selling them. So, here, the vendee bought specific goods and directed the destination of them, thus accepting them as the very subject of his purchase, and, as the very goods which he had ac-

that this was not a "part-accepting" of the goods. But all that it means is that there was no part receipt of the goods, the sample not being delivered or received as a part of the very bulk. We think that this was accepting the goods as the subject of the sale within the meaning of the statute, and if followed up by the actual receipt of the specific goods bought, the purchaser could not thereafter reject them if they corresponded with the sample, and were, therefore, the actual goods which he had accepted as those to be delivered to him as the specific subject of the sale.

[1] See p. 495.

[2] 15 Q. B. 428.

cepted as the subject of such purchase were received by the wharfinger, if the wharfinger had been his warehouseman, or his servant to actually receive the goods (certainly he was not to "accept" them), then as he had himself accepted them, the actual receipt by himself, through his warehouseman, or servant, would have satisfied the statute. But, unless his act of buying specific goods as the very subject of his purchase was an acceptance of them, then the mere actual receipt by the warehouseman, even had he been the vendee's own, while it would have satisfied the statute as regards the actual receipt required, certainly would not have satisfied the statute with reference to the acceptance, which is also required. But Lord Campbell treats the actual receipt as all that was then necessary. Hence, unless he meant verbally and literally, that, as in Morton *v.* Tibbett,[1] he says, the vendee's taking a sample, and directing the destination of the goods, "was clearly evidence of acceptance" (apart from the actual receipt, which was evidenced by other and later acts); so, in Hart *v.* Bush,[2] the defendant's having bought specific goods at an agreed price, and having directed the destination of them, this was likewise evidence of their acceptance, entirely apart from the alleged actual receipt by the warehouseman; then his judgment is palpably unsound, as it would hold that the carrier could both receive and accept for the vendee, which generally he clearly cannot do, even though the carrier be the purchaser's own carrier, so as to make his receipt the actual receipt of his principal, the purchaser.

Lord Campbell's judgment, *in extenso*, is: "The legislature continues to maintain section 17 of the Statute of Frauds;[3] and I do not think the enactment is satisfied by the facts of the case. *All that can be said is that* the purchaser here named the wharf, and that *there was a delivery* [a delivery, mark! the correlative of receipt, not of acceptance] at the wharf. I think that *where there is a verbal contract, and an order to deliver to a particular carrier, a delivery to that carrier does satisfy the statute.* But in the present case there was a delivery at the wharf only; the wharfinger had only to see that the goods were properly put on the wharf and hoisted on board ship."

Literally, this exactly meets our contention as to the meaning of the statute. Thus, "where there is a verbal contract" (*i. e.*, an agreement between the parties as to specific goods sold), so as to make it *a contract* (*i. e.*, a concluded contract for the sale of specific goods, such, for instance — and for instance only — as at common law would pass the property in the specific goods without a transmutation of the possession), there there is an

[1] 15 Q. B. 428.
[2] E. B. & E. 494.
[3] This with a kind of resigned *abandon*.

acceptance, a specifying, a recognizing, a taking to, as the very subject of the contract, the goods which are specifically sold. Then, when, following, accompanying, or preceding this acceptance there is an actual receipt (which may be manual, constructive, or symbolical) by the purchaser, or by some one authorized by him, so that the goods are in his actual or constructive possession, discharged of the vendor's lien and of the right of the *stoppage in transitu*, there, we think, there have been the acceptance and the actual receipt of the statute, and the property and the possession in and of the goods are in the vendee, and the exception in the seventeenth section of the statute is satisfied.

If Lord Campbell really meant this in his judgment in Hart *v.* Bush, then, we think, he was entirely right; and if he did not mean it, he, then, wrote wiser than he knew. We think he was at least literally correct, whether this was accidental or not. But in the case, Coleridge, J., uses the word "accept" as meaning "receipt;" and Earle, J., evidently treated the question as being whether or not the *delivery* at the wharf was an *acceptance and actual receipt* by the defendant, when he says, "I agree that the sending to the wharf, and the putting on the wharf, does not satisfy the words 'accept' and 'actually receive,' however absurd the words of the statute may be;" this suggesting the admission that the judgments of the Court of Queen's Bench on the subject were, as we think they are, based on the erroneous view that "the words of the statute" are "absurd." And we think it is only on their own assumption that the words are absurd, that their "absurd" construction of them can be sustained.[1]

But for what we think is the palpable confusion in so many of the English cases, Nicholson *v.* Bower[2] would be a most valuable case on the subject of "acceptance" apart from the subject of "actual receipt," which (as we have claimed throughout the whole of this Part), notwithstanding the lengthy series of English cases to the contrary, are essentially different things, — the "acceptance" being the assent (as at common law), as an act of the mind, of the purchaser to a specific thing as being the very subject of the contract of sale and purchase which he has made with the vendor; and the "receipt," the transmission of the possession to the purchaser by such acts as at common law, by a manual, constructive, or symbolical delivery, would vest the possession in him.

The more cases we examine, whether they are expressly or

[1] Hart *v.* Bush, is also reported in 27 L. J. N. S. 271. The report of Lord Campbell's judgment there differs materially from that in E. B. & E. 494, showing the hopeless manner in which he was confounding the accepting and the actual receiving of the statute.

[2] 1 E. & E. 172.

impliedly decided in ignoration of the distinction we have made, the more thoroughly we are satisfied with the correctness of this distinction. Assuming that the distinction is correct, it has been held, and we think with unquestionable correctness, that the acceptance and actual receipt of a bulk-sample as and for a part of the very goods sold, are a sufficient acceptance and actual receipt of a part of the goods to take the case out of the statute as to the whole of the goods contracted for; so that on the actual receipt of the balance of the goods the vendee is precluded from objecting to them if they accord with the sample, or, in other words, if they are the very goods which he has accepted or assented to in making the contract for the purchase of goods based on the sample, which, as a very part of the goods, he has actually accepted and as actually received.

But, with the undoubted soundness of these decisions, are we not, as we have previously intimated, carried farther? If, by the acceptance and receipt of the sample as a part of the very bulk of the goods sold and bought, there is an acceptance, and also an actual receipt as well, of some part of the goods bought; why, if there is an acceptance — which simply means an assent (as at common law), as an act of the mind, to the very goods as the particular subject of the sale — of a sample, as the standard of the goods bought, which is not a part of the very bulk sold; why, we repeat, is this, as an acceptance, an assenting to, of the very goods sold and bought, not as effectual *as such acceptance merely*, whether there has been an actual receipt or not? There is, it seems to us, good ground for thinking that it is; and that when there has been an actual receipt of the whole or of any part of the goods, which, as the result of the acceptance and assent of the purchaser to the specified and agreed-upon goods, have been so sold, the requirements of the statute have been met, and there have been both the acceptance and the actual receipt which the statute requires to make the contract for the sale be deemed to be good, which, even at common law, it could not have been, without, on the part of the buyer, his acceptance or assent to the subject as the very subject of the sale.[1] But Nicholson *v.* Bower[2] is an authority expressly to the contrary. But so, also, in effect, are other cases in the Court of Queen's Bench; but only so because they ignore a distinction which, in ignoring, has driven the Court of Queen's Bench to the confession, in effect, that under their holdings the statute is "absurd:"[3]

[1] See *post* in this Part, where, under the latest authority, this view is fully sustained.

[2] 1 E. & E. 172.

[3] *Per* Erle, J., in Hart *v.* Bush, E. & B. 494, 498. And see *per* Lord Campbell, C. J., in s. c. 27 L. J. N. S. Q. B. 271, and in previous cases cited by us in this Part.

leading to the inevitable conclusion that if (as we think it is not) the statute is not absurd, the decisions, which are based and built up only on the assumption that it is "absurd," must themselves rather come within the designation which they have applied to the statute itself.

In Nicholson *v.* Bower[1] there was a purchase by sample of 141 quarters of wheat, to be delivered in London. The wheat was duly shipped by the vendor to the vendees, under circumstances which it was conceded amounted to an actual receipt by the vendees of the specific wheat purchased by them, the possession being constructively in them, — being held for them by the warehouseman, and the *transitus* being at an end. The wheat was really equal to the sample, so that the purchasers had actually received the 141 quarters of wheat which was the specific subject of their purchase and of the vendor's sale. The usual course of business of the warehousemen in warehousing grain was to keep it, if required, for fourteen days, free of charge; at the end of which time it was taken away by the consignee, or delivered to him by the warehousemen at his expense. It is also usual in the corn trade, when corn is warehoused for the consignee, before finally removing it, to take a sample from the bulk as delivered at the warehouse, and compare it with the sample by which it was purchased. In this case the purchasers sent their carman for the bulk-sample, which they received, and which corresponded with the sample under which they purchased the goods. Here, then, if an actual receipt of a part of the goods purchased were identical with the acceptance, so that the actual receipt covered the acceptance as well, there was not only the actual receipt involved in the goods being in their constructive possession, by their being held for them by their own warehouseman, — the right of *stoppage in transitu* being thus gone, — but there was also the actual receipt of a part of the goods sold by their obtaining manual possession of bulk-samples of the very goods which they had bought. But, after taking these bulk-samples, finding themselves in a state of insolvency, they declined to take the goods under the purchase; and the vendor, becoming aware of their insolvent state, sent to the warehouse and stopped the wheat, directing the warehousemen to hold it to his order; which they accordingly did. On an issue between the assignees in bankruptcy and the vendor, the Court of Queen's Bench held that, notwithstanding the actual receipt of the wheat by the vendee, there was no acceptance of it by him.

As far as we can see, there is only one possible ground, and

[1] 1 E. & E. 172.

that, we think, is, at best, *an exceedingly doubtful one*, on which the case of Nicholson *v.* Bower can be sustained. This brings us to another point in connection with the seventeenth section of the statute, that has been in our mind all through this discussion of the subject, but which no previous case has even remotely touched. The language then, is, that the contract shall not be good "except the buyer *shall accept* PART OF THE GOODS SO SOLD, and *actually receive* THE SAME." There must then be not only the contract made for the sale and purchase of the goods, but the buyer must actually receive some part of the goods, and *such part of the goods* must be received *with acceptation* by him; as receiving and accepting, assenting, appropriating, recognizing, taking to them as a part of the very subject of the purchase. Unless he does this, even though he may have agreed or assented to, or accepted as the very subject of the sale, the whole of the particular goods, yet, to make the sale good, according to this view, there must be a specific acceptance as an act of the mind of the very part of the goods which he receives. Thus, on this argument, notwithstanding his acceptance, or assent, to the general subject of the purchase, unless he specifically accepts the very part which he actually receives, there is no acceptance of the part which he actually receives, if, on his receipt of it, he rejects it. Thus, according to this, there may be an acceptance as an assent to the sale of specific goods, and yet this not meet the requirements of the statute; as also there may be an actual receipt of the whole of the goods, and the vendee may arbitrarily reject them. But, unless, to sustain this view, both of these — *i. e.*, the acceptance and receipt — unite in the very matter which is received, and there is the actual receipt of some part of the goods, which *part* is not only received by the vendee but is also accepted by him, — that is, received as an accepted part of the goods bought, — there is no good sale.

It is only on this refining of the statute that, we think, it is at all possible that Nicholson *v.* Bower [1] can, if at all, be sustained. That case decides that there may be an actual receipt of the whole of the goods, so that the *transitus* is at an end, and the right of *stoppage in transitu* gone; and there may be an actual receipt of both samples of the goods, which correspond with the samples from which the purchase was made, and an actual receipt of the whole bulk itself, which corresponds with the original sample and with the bulk sample; and yet if neither the bulk sample, nor the bulk itself, was *received with acceptation*, so as to have the acceptance, as the appropriating or taking to of some "part of the

[1] 1 E. & E. 172.

goods" actually received, applied to that very part of the goods which has been received, the actual receipt is not sufficient, for the buyer must "accept part of the goods so sold, and actually receive the same," or there is no good contract. To sustain this position it might be claimed that if this were not the meaning of the statute, and the term "accept" were not specifically applied to the *part* of the goods which have also to be received, with a specific acceptance as showing that they were a part of the very goods so sold, the language of the statute more properly would have been "except the buyer accept the goods and actually receive some part thereof." But, instead of this, the language is "except the buyer shall accept *part of the goods so sold*, and actually receive *the same;*" showing that a general acceptance or assent to the goods as the subject of the sale is not sufficient; but that there must be a special acceptance of the part of the goods sold which is actually received; and, therefore, as in Nicholson *v.* Bower,[1] where there has not been a specific acceptance of some part or the whole of the goods which are actually received, there is no good contract, notwithstanding such actual receipt.[2] Although we think it is only by this refining of the statute that any ground can be found upon which Nicholson *v.* Bower can be sustained, we think that even this fails. Where there is an acceptance of the whole, as the greater includes the less, there is an acceptance of the part; and there may be an acceptance of the part where there is not an acceptance of the whole, as in such cases as Elliott *v.* Thomas[3] and Scott *v.* The Eastern Counties Railway Co.[4] On the whole, we are of the opinion that no tenable ground can be found for sustaining Nicholson *v.* Bower, and that that case is wrongly decided.

In Currie *v.* Anderson[5] it was held, where goods of the value of £62 10*s.* were sold by the plaintiffs to the defendant, and shipped for the defendant to the defendant's consignees; but, at the request and for the accommodation of the defendant, the goods were shipped by and in the name of the plaintiffs, the defendant paying the freight on the goods and treating them as his own, that this dealing with the goods, under the authority of Morton *v.* Tibbett,[6] was evidence from which the jury could properly find that the goods had been accepted and actually received to satisfy the statute.

The Court of Exchequer Chamber, in Castle *v.* Sworder,[7] re-

[1] 1 E. & E. 172.
[2] See *infra*, p. 414, and n. 1, where this point is again adverted to and disposed of.
[3] 3 M. & W. 170.
[4] 12 M. & W. 33.
[5] 2 E. & E. 592.
[6] 15 Q. B. 428.
[7] 6 H. & N. 328; 30 L. J. N. S. Ex. 310.

versed the judgment of the Court of Exchequer.[1] The decision in the court below proceeded on the ground that there could not be an acceptance and actual receipt of goods of over the value of £10, under a verbal sale, to satisfy the statute, where the goods remained in the possession of the vendor with his lien attaching. The court above did not dissent from this position; but they held that, where the vendor's holding of the goods had changed, as in Elmore *v.* Stone,[2] and in similar cases cited by us, *supra*, that the possession of the vendor was simply that of bailee, and that, in such case, his lien was gone, and that Castle *v.* Sworder came within this principle; the vendor simply holding as warehouseman for the vendee without any lien, the constructive possession being in the vendee, who could maintain trover for the goods. Cockburn, C. J., stated, in this case, that he considered the terms "acceptance" and "actual receipt" were equivalent. We think Nicholson *v.* Bower,[3] no matter what may be thought of that decision, effectually disposes of that contention. There, there was not only an actual receipt of bulk samples of the goods bought, but the goods were in a warehouse in the name of the vendee, so that, it virtually became the vendee's own warehouse, and so that there had been such a complete transmission of the possession from the vendor to the vendee that the right of *stoppage in transitu* was gone. And yet it was there held, no matter with what questionable correctness, that there had been no acceptance of the goods; and yet the actual receipt was so clear that the vendor's lien and right of *stoppage in transitu* were gone, and the actual receipt was so effective and conclusive, that, the bulk having corresponded with the sample, the vendee had not even the right of rejection. And yet, notwithstanding such an unquestionable actual receipt as there was in Nicholson *v.* Bower, it was there held that there was not even in that case an acceptance of the goods within the exception to the seventeenth section of the statute. Surely, the acceptance and the actual receipt of the statute are very far from being equivalent, notwithstanding the host of English cases which, in effect, treat them as such.

Cockburn, C. J., makes a mistake, too, in using the term "accept," treating it as he does as synonymous with receipt, where he refers to the rule "that where a person chooses to *accept* [? receive] goods without exercising his right to inspect them he waives his right to reject them, and must be taken to have accepted [using the word correctly here] them without examination." The rule itself will show the distinction between the

[1] Castle *v.* Sworder, 5 H. & N. 281; 29 L. J. N. S. Ex. 235.
[2] 1 Taunt. 458.
[3] 1 E. & E. 172.

acceptance and the receipt, as it, virtually in terms, shows, that there may be an actual receipt, and an implied acceptance, where there have been *laches* on the part of the vendee after the actual receipt.

As we have seen by the decision in Nicholson *v.* Bower,[1] the statement which was made by Cockburn, C. J., in Castle *v.* Sworder,[2] that the terms "accept" and "actually receive" are equivalent, and which statement has, in effect, as we have shown, been reiterated and acted on by so many judges in England, of very high standing, is inaccurate, as in Nicholson *v.* Bower there was not only a constructive receipt of the whole of the goods, which was so "actual" that the right of *stoppage in transitu* had been extinguished, — the possession was so entirely out of the vendor and *his* carrier, — but there was also the "actual" receipt, the "manual prehension," of a very part of the goods sold, in the bulk samples which were received by the vendee; and yet, in that case, it was held that there was *no acceptance* of the goods, the effect of the holding being that there was no prior acceptance, and that the receipt of the goods not being with the purpose of accepting them, — of recognizing, appropriating, and taking to them as the accepted subject of the contract, — there was no acceptance.

Now, in Cusack *v.* Robinson,[3] which is a case on the construction of the statute of the highest importance, it is shown that there may be an acceptance within the statute, whether or not there have been an actual receipt of the goods, and entirely independent of this fact. This case considered with Nicholson *v.* Bower[4] is an extremely important one on the subject of acceptance.

The facts in Cusack *v.* Robinson were that the defendant, a London merchant, called on the plaintiffs, October 24, 1860, at Liverpool, and said he wanted to buy from 150 to 200 firkins of Canadian butter. He then went with one of the plaintiffs, and was shown a lot of 156 firkins of the butter, which he then had an opportunity of inspecting, and did open and inspect six firkins of the lot. After this they examined other butter, which did not suit the defendant. At a later period of the same day the plaintiffs and the defendant made a verbal agreement by which the defendant agreed to buy the specific lot of 156 firkins at 77*s.* *per* cwt. When the price had been agreed on, the defendant took a card on which his own name and address in London were written, and wrote on it "156 firkins butter to be delivered at Fenning's Wharf, Tooley Street." He gave this to the plaintiffs, and at the same time said that his agent, C., at Liverpool, would give

[1] 1 E. & E. 172.
[2] 6 H. & N. 828, at p. 835.
[3] 1 B. & S. 299.
[4] 1 E. & E. 172.

directions how the goods were to be forwarded to the defendant at Fenning's Wharf. These acts, independent of the question of actual receipt, were held to be an acceptance within the exception of the statute, of the specific 156 firkins of butter. At this stage of the case, certainly, there was no actual receipt of the butter. Subsequently, by C.'s directions, the plaintiffs delivered the butter to P. & Co.'s carts, to be forwarded from Fenning's Wharf to the defendant. The plaintiffs sent an invoice dated October 25, 1860, to the address on the defendant's card. The receipt of this was acknowledged. On October 27 the plaintiffs, in Liverpool, received a telegram from the defendant, in London, in effect asserting that the butters had been sold by the plaintiffs subject to a warranty, but that they were not equal to sample, and, therefore, would be returned. The plaintiffs denied that there was a warranty, and refused to receive the butter back. In an action for the price, it was proved that the proprietors of the wharf had a butter warehouse which was used by their customers; that the defendant had used the warehouse for fifteen years, and was in the habit of keeping his butters there till he sold them; and that on October 26 P. & Co. had delivered a part of the 156 firkins in question at the warehouse, and delivered the residue on the morning of October 27. The witness could not state whether any one came to the warehouse to inspect the butter or not; but he proved that it was delivered up by Fenning to P. & Co. under a delivery order from the defendant dated October 27. The statute was relied on, but the jury found for the plaintiffs. The court held that the evidence established an acceptance and actual receipt of the butter.

The head-notes of the reporter, corrected, are: 1. In order to satisfy the statute there must be both an acceptance of the goods, or part of them, and an actual receipt of them (or part of them). 2. In order to satisfy the statute it is not necessary that the acceptance of the goods should follow or be contemporaneous with the receipt of them; an acceptance prior to the receipt will suffice.

On the question of acceptance, counsel put this case: "There is a distinction between the cases of a purchase of specific goods and of goods which are in bulk and not ascertained. Suppose a man goes into a shop and says: 'I buy that chattel; send it to such a place, or give it to a porter,' and afterwards receives it, and exercises an act of dominion over it, he has done everything the statute requires to constitute an acceptance and receipt." Here the buying of the specific, ascertained chattel would be an acceptance of it, and would precede the actual receipt. So, Hill, J., on

the argument, put this case: "A bargain and sale between vendor and vendee valid in all respects except for the Statute of Frauds; goods sent by vendor under the direction of vendee to warehouse-keeper selected and nominated by vendee; vendor parted with his lien, and the *transitus* at an end. Do these facts constitute an acceptance and actual receipt within the meaning of the seventeenth section of the Statute of Frauds?" Here Hill, J., puts exactly the case of Cusack *v.* Robinson,[1] which case answers his question in the affirmative. To make a bargain and sale between the vendor and vendee good at common law there must be the sale of specific, ascertained goods, and hence, by Cusack *v.* Robinson, this much is settled, that the buying of specific, ascertained goods is an acceptance of them.

Blackburn, J., to whom we have frequently referred as one of the very ablest of the English judges, and who, we think, if he were now rewriting his generally excellent little work on Sales, would in some respects essentially alter it, in delivering the judgment of the court in Cusack *v.* Robinson,[2] dealing with Nicholson *v.* Bower,[3] says of it: "The 141 quarters of wheat were sent by a railway, addressed to the vendees. They arrived at their destination, and were there warehoused by the railway company under circumstances that might have been held to put an end to the unpaid vendor's rights. But the contract was not originally a sale of specific wheat, and the vendees had never agreed to take those particular quarters of wheat. On the contrary, it was shown to be usual, before accepting wheat thus warehoused, to compare a sample of the wheat with the sample by which it was sold; and it appeared that the vendees, knowing that they were in embarrassed circumstances, purposely abstained from accepting the goods, and each of the judges mentions that fact as the ground of their decision." And, referring to the language of

[1] As in a bargain and sale by sample at common law, and a delivery of the identical goods sold, so that the vendor has parted with his lien and the *transitus* is gone, there is a perfectly good acceptance and actual receipt of them at common law; equally so is there under the statute, which simply adopts the common-law terms, "accept" and "receive," in their strictly technical sense. Thus, on this principle, Cusack *v.* Robinson, 1 B. & S. 299, being well decided, manifestly, Nicholson *v.* Bower, 1 E. & E. 172, was wrongly decided, the effect in this latter case of the acceptance by the very act of buying specific goods being ignored. See Baldey *v.* Parker, 2 B. & C. 37, where there was an acceptance of specific goods sold, but no actual receipt of them. And in Bushel *v.* Wheeler, 8 Jur. 532, the language of Lord Denman, C. J., is: "The purchaser may depute another person to exercise a judgment for him as to the quality of the goods, or he may rely upon the judgment and integrity of the manufacturer from whom he orders the goods. In these cases, it seems to me, there may be an acceptance within the statute without an actual manual receiving." This language would have been still more significant but for the loose manner in which Lord Denman, as well as so many other of the English judges, was in the habit of using the terms "accept" and "receive" as interchangeable merely.

[2] 1 B. & S. 299, 307.

[3] 1 E. & E. 172.

Holroyd, J., in Baldey *v.* Parker:[1] "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and, therefore, so long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute;" Blackburn, J., says of this: "The principle here laid down is that there cannot be *an actual receipt* by the vendee so long as the goods continue in the possession of the seller, as unpaid vendor, so as to preserve his lien; and it has been repeatedly recognized. But though the goods remain in the personal possession of the vendor, if it be agreed between the vendor and the vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute."

And, dealing with Cusack *v.* Robinson,[2] Blackburn, J., says: "In the present case there was ample evidence that the goods, when placed in Fenning's Wharf, were put under the control of the defendant, to await his further directions, so as to put an end to any right of the plaintiffs as unpaid vendors, as much as the change in the nature of the possession did in the cases cited. There was also sufficient evidence that the defendant had at Liverpool selected these specific 156 firkins of butter as those which he then agreed to take as his property as the goods sold, and that he directed those specific firkins to be sent to London. *This was certainly evidence of an acceptance;* and the only remaining question is, whether it is necessary that the acceptance should follow, or be contemporaneous with the receipt, or whether an acceptance before the receipt is not sufficient. . . . The intention of the legislature seems to have been that the contract should not be good unless partially executed; and it is partially executed if, after the vendee has finally agreed on the specific articles which he is to take under the contract, the vendor, by the vendee's directions, parts with the possession, and puts them under the control of the vendee, so as to put a complete end to all the rights of the unpaid vendor as such. We think, therefore, that there is nothing in the nature of the enactment to imply an intention, which the legislature has certainly not in terms expressed, that an acceptance prior to the receipt will not suffice. There is no decision putting this construction on the statute, and we do not think we ought so to construe it."

[1] 2 B. & C. 37, stated by us *supra*.

[2] 1 B. & S. 299, at pp. 308–310.

The principle as to acceptance decided in Cusack *v.* Robinson[1] was recognized and acted on in The Bog Lead Mining Co. *v.* Montague,[2] where the question came up as to an acceptance of stock under the English Joint Stock Companies' Act, 1856.[3] By that act it is provided that "no person shall be deemed to have accepted any share in the company unless he has testified his acceptance thereof by writing under his hand in such form as the company from time to time directs;" and section 19 enacts that "every person who has *accepted* any share in a company registered under this act, and whose name is entered in the register of shareholders, and no other person, . . . shall, for the purposes of this act, be deemed to be a shareholder." The defendant in this case paid the necessary deposit, and filled up, signed, and sent to the directors of the company their printed form of application for shares, thus: "Having paid to the Bank of London to your credit £5, being a deposit of 5*s. per* share on twenty shares in the above company, I request you to allot me that number of shares; and *I hereby agree to accept the same*, and undertake to pay the amount of calls that may be made thereon, in accordance with the company's act of incorporation." The company allotted the defendant the number of shares applied for, and his name was entered on the register of shareholders, and he paid two calls upon the shares so allotted him; but he never testified his acceptance of the shares "in writing under his hand" otherwise than by signing the letter of application, and the company never "directed" any other form. The court, following Cusack *v.* Robinson[4] as to an acceptance to satisfy the Statute of Frauds, said: "It may be that, in the case of a contract for the purchase of unascertained property to answer a particular description, no acceptance can be properly said to have taken place before the purchaser has had an opportunity of rejection. In such a case the offer to purchase is subject not only to the assent or dissent of the seller, but also to the condition that the property to be delivered by him shall answer the stipulated description. A right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance, so as irrevocably to vest the property in the buyer, can take place before he has exercised or waived that right. In order to constitute such a final and complete acceptance, the assent of the buyer should follow, not precede, that of the seller. But where the contract is for

[1] 1 B. & S. 299; s. c. 7 Jur. N. s. 542.

[2] 10 C. B. N. s. 481.

[3] 19 & 20 Vict. c. 47. See the New Brunswick Railway Co. *v.* Muggeridge, 4 H. & N. 160, 580, under the same act.

[4] 1 B. & S. 299.

specific, ascertained chattel, the reasoning is altogether different. Equally where the offer to sell and deliver has been first made by the seller and afterwards assented to by the buyer, and where the offer to buy and accept has been first made by the buyer and afterwards assented to by the seller, the contract is complete by the consent of both parties, and it is a contract the expression of which testifies that the seller has agreed to sell and deliver, and the buyer to buy and accept, the chattel. And, indeed, it has been expressly decided that, in this latter case, the Statute of Frauds may be satisfied by an acceptance preceding the delivery. Cusack *v.* Robinson." [1]

The distinction between the acceptance and the actual receipt of the statute is very marked in Simmonds *v.* Humble.[2] There hops were sold by sample, and before prompt day the buyer's foreman attended at the warehouse of the seller's factors to see them weighed, compared each pocket with the sample, and adjusted allowances on some which he objected to. The question was left to the jury whether or not there had been an acceptance of the hops, under the contract, to satisfy the statute, no point having been made whether or not there was a sufficient receipt. It was held that there was an acceptance, Williams, J., saying: "As to the acceptance, the question is whether there was any evidence upon which the jury might properly be directed that there had been a sufficient acceptance. I think there was. After the making of the contract, there was not only a verification of the bulk by comparison with the sample, but a weighing and approval by the agents of both parties. Add to this the evidence of the witness who stated that he never knew of an instance of a contract having been thrown up after this ceremony has been gone through." And Byles, J.: "As to acceptance, the hops were compared with the samples and weighed, and the allowances settled on certain of the pockets which were objected to,— deductions from the price to be paid. I observe also that there was evidence that, by the usage of the trade, after the hops had been weighed and approved, objections are no longer heard. It is clear, therefore, that there was an acceptance." The court also dealt with the question independently whether there had been or not, also, an actual receipt. And they held that as, in the case, the warehouseman where the hops were examined and weighed became, as soon as the sale was perfected, the bailee for the buyers, there had also been an actual receipt to satisfy the statute,— Erle, C. J., and Keating, J., concurring in the judgment on both points.

[1] 1 B. & S. 299; 7 Jur. N. S. 542. [2] 13 C. B. N. S. 258.

Bramwell, B., in Bowes *v.* Pontifex,[1] refers to the question of acceptance under the Statute of Frauds, as being "one of the most difficult questions in the law;" and says, applicable to the case where the goods have been *received prior to acceptance*, very correctly: "Certainly, unless 'accept' means no more than 'receive' (as surely it must, for otherwise the word 'deliver' would of itself have sufficed), acceptance must mean some act or conduct on the part of the buyer indicating an intention to retain the goods, or such as reasonably to lead the seller to suppose so."[2] In this case, there was a verbal contract on April 11, for the sale and purchase of a quantity of lead ashes, between the plaintiffs and defendants, which were delivered on the 12th; there having been a previous sale of a quantity of lead ashes to the defendants. The delivery of these sold on the 11th was made on the 12th; the defendants having leave to assay the ashes, which were sold to be equal to the previous lot. On April 22, the plaintiffs were advised that the last lot was not equal to the previous lot, and replied, offering an allowance; but, after some further correspondence, the defendants refused to accept the ashes on any terms. The effect of the jury's finding was that the ashes had not been repudiated within a reasonable time, and that an acceptance by the defendants must be presumed from their delay in not having repudiated them sooner after their receipt. The finding was not disturbed on the question of law involved in the case.

In Barnett *v.* Farley,[3] where goods sold by a verbal contract were received, it was held that, to satisfy the statute, there must be such an acceptance of them by the buyer as to be a recognition by him that they were the goods which he has bought; that, while there must not be such an acceptance as would preclude the buyer from making a subsequent complaint, there must be such an acceptance as to show that he recognizes a compulsion to take the articles delivered to him under a contract for the sale of them.[4]

[1] 3 F. & F. 739, 742.

[2] In Hardman *v.* Bellhouse, 9 M. & W. 596, where a question arose as to whether parties had *accepted* a bill of exchange in payment for goods in satisfaction for the goods which had been *received* by them, it was held that *acceptance* in satisfaction must be an act of the will in the party receiving; Alderson, B., in delivering the judgment of the court, saying: "Every *receipt* is not an *acceptance*, but if the party accepts the thing, though but for a moment, for that for which the other pays it, he cannot afterwards, by his subsequent dissatisfaction, get rid of the effect of it." And see Hart *v.* Boller, 15 S. & R. 162; Jones *v.* Shawhan, 4 W. & S. 257, 263; Mason *v.* Wickersham, 4 W. & S. 100; Shemerhorn *v.* Loines, 7 Johns. 311; Porter *v.* Talcott, 1 Cow. 359. See further as to acceptance, Evans *v.* Powis, 1 Ex. 601; Curlewis *v.* Clark, 3 Ex. 375; Bainbridge *v.* Lax, 9 Q. B. 819; Moss *v.* Sweet, 16 L. T. Q. B. 441; Iley *v.* Frankenstein, 8 Scott, N. R. 839; Curtis *v.* Pugh, 10 Q. B. 111; Pettit *v.* Mitchell, Car. & M. 424; Gilliat *v.* Roberts, 19 L. J. Ex. 410; Cunliffe *v.* Harrison, 20 L. J. Ex. 325; Archer *v.* Bayne, *Ib.* 54; Currie *v.* Anderson, 29 L. J. Q. B. 87; Sayers *v.* Birmingham Gas Co., 27 L. J. Ex. 295.

[3] 11 L. T. N. S. 107.

[4] On this point, see our comments on the next succeeding case.

The distinction which we have made (see *ante* p. 379) between the effect of the acceptance and actual receipt of the whole of the goods, and of the acceptance and actual receipt of only a part, as regards the effect on the seller's lien, where the sale is not on credit, was lost sight of by counsel in Kershaw *v.* Ogden,[1] as it has been by courts and counsel in so many other cases. The facts in that case were that, in December, 1863, the plaintiff, a cotton-spinner, having some cotton waste for sale, G., an agent of defendants, also cotton-spinners, went to the plaintiff's warehouse, when he was shown by the warehouseman five stacks of cotton waste. He asked for a sample and was told it was not the plaintiff's course of business to sell by sample, but that he might examine the stacks and take a sample himself, which he did. After some negotiation, G. agreed to purchase four of the stacks at 1*s.* 9*d.* a pound, the defendants to send their packer and sacks, and their cart to remove it. On January 3, following, the defendants sent their packer with eighty-one sacks, to pack the waste, and he, with the assistance of the plaintiff's men, packed the four stacks into those sacks. On January 5, twenty-one sacks were weighed, put into the defendants' cart, and taken to their premises, together with a delivery order stating the weight. The remainder of the sacks were not weighed. On the same day, the twenty-one sacks of cotton waste were returned to the plaintiff by the defendants, with a note, stating that the waste was of an inferior description to that purchased by them. The defendants' carter took the horse out of the cart and left it loaded with the waste outside of the warehouse of the plaintiff, who, to prevent it from spoiling, ordered it to be placed under shelter, and the next day removed it from the cart into his warehouse. In an action for the price, the declaration contained a special count for not accepting the goods, with counts for goods bargained and sold, and goods sold and delivered. The Statute of Frauds was relied on, but the jury found that the defendants did accept and actually receive part of the goods. In the court above, the defendants' counsel claimed that the men who packed the waste were not the defendants' agents to accept it, and that the defendants had the right on the waste arriving at their premises to reject and return it; relying on the entirely immaterial fact, as regards the operation of the statute, where there have been an acceptance and a receipt of a part, that the lien still continued on the undelivered part of the waste. The court sustained the finding of the jury, Martin, B., saying: "The question depends upon what was the contract, and the jury have found that it was a contract to buy four

[1] 3 H. & C. 717.

stacks of cotton waste specifically agreed on, more or less, taking them for better or worse. If that finding is correct, of which I entertain no doubt, the result is that the property in the four stacks passed to the defendants, and the plaintiff became entitled to recover the price in an action for goods bargained and sold. The seventeenth section of the Statute of Frauds requires that there shall be an acceptance and actual receipt of part of the goods. Here the defendants sent their packer to pack the goods, and their cart to bring them away; and the moment they were put into their cart and taken away, *if not before*, there was evidence for the jury of an acceptance and actual receipt; and if they had found that there was none, I should have been prepared to set aside the verdict, as against the evidence." We think that, independent of the question of actual receipt, the acts of G. constituted an acceptance of the cotton waste as the subject of the sale and purchase, within the meaning of the exception in the statute, prior to the actual receipt, by the manual prehension of the goods, by the defendant's carriers.

The very nicest question, from one point of view, in connection with this complex subject, is, we think, as to what is an acceptance within the language of the statute, that "the buyer shall *accept part of the goods so sold*, and *actually receive the same*," to which we have previously referred. And, we think, that instead of being assisted by the large majority of the cases which have been decided under this clause of the seventeenth section of the statute, we are actually hindered by them, failing, as so many of them do, to discriminate between the *acceptance* and the *actual receipt* required; and, also, in their failure to notice the difference between the effect produced by an acceptance and actual receipt of a part, and the acceptance and actual receipt of the whole, of the goods. Indeed, we have so far found no case in which the question as to what the acceptance "of a part of the goods so sold," apart from the very different question of the actual receipt of the part of the goods which have been so accepted, is referred to or considered at all. And yet, we think, to get at the very foundation of this clause of the section, the satisfactory disposal of these questions is a subject of the highest importance.[1]

[1] The language of the section is, as above, "except the buyer *shall accept part* of the goods so sold, and *actually receive the same*." We think this may meet the difficulty which presents itself to us. Assuming that the buying of specific goods is in itself, in effect, an accepting of the whole of the goods as the subject of the verbal contract, so that their actual receipt, or the actual receipt of some part of them, will take the case out of the statute; in cases where the sale is not of specific goods, there may be an acceptance and actual receipt of a part of the goods only, — neither an acceptance nor actual receipt of the whole of them, — which will take the case out of the contract as to the whole of the goods. In the former case the greater would include the less, — the whole, the part; and in the latter the

There are numerous cases where both of these questions suggest themselves, particularly in that class of cases where there has been a sale by sample, and more particularly where there have been an acceptance, a delivery, and a corresponding receipt of bulk samples as and for a part of the very goods sold and bought; and yet, as a rule, both of these questions, even in this class of cases, are virtually ignored.

Smith *v.* Hudson[1] was the case of sale by sample where reasonably we might have expected that there would have been an attempt there made to have defined an acceptance within the meaning of the statute; but, although we find Blackburn, J., there saying, "It is almost a contradiction to say that there is a delivery and yet not a receipt. *An acceptance* under section 17 of the Statute of Frauds *is another question*," neither he nor any other member of the court there attempts a statement of what such an acceptance must be, except it is contained in the judgment of Mellor, J., where he says: "In order to bind the contract there must be *an assenting* to an actual sale of the goods." Cockburn, C. J., says: "There is a distinction between a mere receipt and a

requirements of the statute would be literally met. But see Hodgson *v.* Le Bret, 1 Camp. 233, where there was an acceptance of part of the goods, which was held not to take the case out of the statute as to other goods bought at the same time, which were not accepted, being of a different class, and not being specific or ascertained goods. But, in this case, these latter goods were not, as the accepted goods were held to have been, actually received. It is much to be regretted that, in the confusion which has existed in the English cases as to the distinction between the accepting and the actual receipt of the statute, we are there entirely without judicial decision or consideration as to the effect of the term "shall accept *part* of the goods so sold;" or how there can be an acceptance, either at common law or under the statute (aside altogether from the actual receipt required), of a part of the goods sold, which can make the contract of sale be deemed good as to the goods which have not been accepted. Judicial investigation of this subject seems desirable.

The term "accept part of the goods so sold" might possibly have been intended to cover the case where a purchase had been made of non-specified goods, and, subsequent to the purchase, a part of the goods be received and accepted as representing the whole of the goods purchased under the contract, in which case such acceptance and receipt of a part would bind the contract as to the whole. Or, in the same way, after the purchase of non-specified goods, there might be acts — as the acceptance is an act of the mind — which would constitute an acceptance of a part of the goods, without the actual receipt being concurrent with it; and then, on the vendee actually receiving the part he had accepted, that would be sufficient to take the case out of the statute as to the whole of the goods. Or, again, in the case of a sale by sample, where the sample has been received as a part of the bulk of the goods sold, while this, in one sense, might be said to be an acceptance or assenting to of the whole of the specific goods sold, yet, where the bulk when received has not corresponded with the sample, as that was not accepted, though received, there might here be said to have been only an acceptance of the part. There may be an acceptance of the whole, and an actual receipt of some part of the goods, which would, of course, satisfy the statute. So where the goods consist of different lots, there could be an acceptance of one or some of these lots, and an actual receipt thereof, which would make literally an acceptance and actual receipt of some part of the goods, and which would be a verbal conformance with the language of the statute. Or, further, there may be an actual receipt of a part of the goods, and a concurrent or subsequent acceptance, and the statute would be satisfied.

[1] 6 B. & S. 431.

receipt *animo accipiendi*, and, in the present case, the sale being by sample, the buyer had a right to see whether the bulk was according to the sample, and until he had exercised that right there was no acceptance within the statute."

Here the acceptance is put as though it were a part of the receipt, — "a receipt *animo accipiendi*,"[1] — and, further, that where the sale is by sample there is no receipt *animo accipiendi* until the buyer has exercised his right of ascertaining whether the bulk corresponds with the sample or not. But, right in the face of this, again, we have Mellor, J., in the same case, saying: "There may be an acceptance and receipt to satisfy the statute, and yet the buyer may refuse to carry out the contract, on the ground that the goods were not according to the contract." And, on the argument of the case, we have Cockburn, C. J., himself saying: "The defendant had performed his part of the contract by delivering the goods to the agent of the vendee. Is there any case in which, after the seller has done all that lies on him to do, he can repudiate the contract and demand back the goods?" And, "Suppose the purchaser accepts, subject only to a right to reject the goods if they do not correspond with the sample, does not the property in the goods pass, as far as the vendor is concerned, unless there be something to show that such was not the intention of the parties?"

In reply to the former of these questions, we would say that there is a case which so decides, viz., Nicholson *v.* Bower;[2] and, if that case is correctly decided (of which we must say, we think, with a more correct view furnished by principle and by other cases than is entertained in it of what an acceptance under the statute really is, there is the greatest doubt), then Smith *v.* Hudson[3] is also correctly decided. But if one of them is not correctly decided, obviously neither is the other. In reply to the latter question of Cockburn, C. J., we think it is quite well decided that if, in addition to the acceptance of which he speaks, and which he assumes, but incorrectly,[4] implies receipt as well, there be also the actual receipt of the goods, the statute is complied with, even though the vendee may have a right, after the acceptance and receipt of the goods, to return them. Such would be the common case of a sale by sample where the bulk sample, as and for a part of the very goods sold, had been accepted and actually received, so as to make the contract good

[1] In fact, Cockburn, C. J., on the argument expressly says: "If the vendor delivers to the purchaser, the delivery and acceptance are mutual," treating acceptance simply as synonymous with receipt.

[2] 1 E. & E. 172.

[3] 6 B. & S. 431.

[4] See Cusack *v.* Robinson, 1 B. & S. 299, stated *supra*.

within the statute; and yet, after the receipt of the bulk the vendee would still have the right of rejecting and returning the goods if they were not according to the sample, and, therefore, they proved not to be the goods which he had accepted, and of which he had actually received a part. And the fact that this is so causes us very seriously to doubt the correctness of the decisions in Nicholson *v.* Bower [1] and Smith *v.* Hudson.[2]

The case in Smith *v.* Hudson [3] was of 48½ quarters of barley, at 35*s. per* quarter, by verbal contract, the sale being on November 3, by sample. The bulk was delivered on November 7 to a railway station, under circumstances which made the station the warehouse of the vendee, the *transitus* having there ended, the vendee having no warehouse of his own, and being in the habit of reselling barley he purchased, and forwarding it from the station to the purchasers on selling it. It is the custom of the trade on purchases by sample for the buyer to compare the sample with the bulk as delivered, and if the examination is not satisfactory, either to reject it or to allow it to remain as the property of the vendor; and, in this case, such was the power of the purchaser. On November 9, the vendee was adjudicated bankrupt, and on the eleventh the vendor gave notice to the station-master not to deliver the barley, and that he claimed it as his property, which, on his indemnifying the company, was subsequently (on December 5) surrendered to him. When the notice was given the company the barley was still with them, they holding it, free of damage, for five days after its receipt, according to their usual custom; the vendee down to that time having made no disposition of the barley; had not examined it to see whether the bulk corresponded with the sample, nor had given any notice to the vendor of retaining or rejecting the barley. On December 1, the plaintiffs, being appointed the vendee's assignee, claimed the barley from the railway company. On a special case stated, the court held that there had been no acceptance of the barley to satisfy the statute, and that the barley was not in the apparent possession, order, or disposition of the vendee within the meaning of the English Bankruptcy Act, 12 & 13 Vic. ch. 106, sec. 125.

The very different senses in which the term "accept" is open to, is evident by Lord Chelmsford's use of that term in Carston *v.* Chapman,[4] where the question was not under the Statute of Frauds, but as to the passage of property in goods purchased by sample at common law, independent of the statute. Lord Chelmsford there says: "In England, if goods are sold by sample, and they are de-

[1] 1 E. & E. 172.
[2] 6 B. & S. 431.
[3] *Ibid.*
[4] L. R. 2 Sc. & Div. 250, 254.

livered and accepted [used here, not in the sense of received, but accepted as conforming to the sample, as in the statute] by the purchaser, he cannot return them; but if he has not completely accepted them, that is, if he has taken the delivery conditionally [*i. e.* received, but not accepted them], he has a right to keep the goods for a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample, he is then entitled to return them." [1]

Precisely the same law applies as regards the Statute of Frauds where there have been an acceptance and actual receipt of some part of the goods sold, as, for instance, by the receipt of bulk samples. Yet, as at common law, if the goods are equal to sample, the property therein is vested in the vendee; so, under the statute, the acceptance and actual receipt of a part taking the case out of the statute, the property in the bulk vests on its receipt in the vendee, if it accord with the bulk sample, so as to be the very goods purchased, even though there has been the right of rejecting such bulk if it had proved not equal to sample. And hence, if a purchase by sample is, in itself, an *acceptance* of the whole of the specific goods purchased, represented by such sample, obviously, on the actual receipt of the whole of the goods by the vendee, the property, with the possession, vests in him, even though he have the subsequent right to reject them if they do not accord with the sample; they not being the bulk of the very goods which he has purchased as represented by such sample.[2]

But the question still remains for disposition: Is the purchase by sample (without the delivery and receipt of a bulk sample) a purchase of specific goods represented by such sample, and an acceptance of the goods so purchased by sample, so as, on their actual receipt by the vendee, to make the contract for their sale and purchase be deemed good within the seventeenth section of the Statute of Frauds? We are inclined, on principle, to think that it is, although we know of no case where it is so decided, or where the question is even considered.[3] And, in Nicholson *v.* Bower,[4] and Smith *v.* Hudson,[5] the facts were as here stated, and, in both of these cases it was held that, under such circumstances, on the ground that the cases were not taken out of the statute, the prop-

[1] And see Dixon *v.* Yates, 5 B. & Ad. 313, 340.

[2] See *per* Holroyd, J., in Parker *v.* Palmer, 4 B. & Ald. 393. And *per* Abbott, C. J., *Ib.* 392.

[3] But see the later case of Kibble *v.* Gough, 38 L. T. N. S. 204, stated *infra*, which fully sustains our reasoning and conclusion, although that case is full of the fallacies resulting from the adoption of Lord Campbell's unsound *obiter dictum* in Morton *v.* Tibbett, 15 Q. B. 428. And see Rickard *v.* Moore, 38 L. T. N. S. 841, and Page *v.* Morgan, 15 Q. B. Div. 228, also stated and considered *infra*, similarly sustaining our view.

[4] 1 E. & E. 172.

[5] 6 B. & S. 431.

erty in the goods had not vested in the vendees. But both of these cases were decided without any intelligent consideration of what an acceptance is; while, in Cusack *v.* Robinson,[1] it was held that the purchase of specific goods, in that case, at least, was an acceptance of them within the statute, and that, on their subsequent actual receipt, — they being the very goods which were purchased, — the statutory requirements were met; the property in the goods had vested in the vendee, and that without any power of rejection or rescission. Such being the case, we confess it does not seem very clear to us why the purchase of specific goods in any other cases, whether the purchase be by sample, description, or examination, does not equally amount to an acceptance of them as the very subject of such purchase, to cause the contract for their sale and purchase to be deemed good, on their subsequent actual receipt as the identical goods purchased, recognized, and, shall we say, *accepted*, as the identical subject of the purchase, as designated by such examination, description, or purchase by sample. But we proceed with the remainder of the cases.

The principles laid down by Bovill, C. J., in Heilbutt *v.* Hickson,[2] although applied to the question of the accepting or appropriating goods to a contract of sale, so that the property therein will pass at common law, we think are equally applicable to the accepting or taking to as the goods of the contract, under the statute, so that, on their actual receipt, the contract for their sale and purchase shall be deemed good. Bovill, C. J., lays down the following principles of law as being well settled:

"Where specific and ascertained existing goods or chattels are the subject of a contract of immediate and present sale, and whether there be a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor thereupon has the right to recover the price, unless from some other circumstances it can be collected, that the intention was that the property should not at once vest in the purchaser.

"Where there is a warranty of the quality of such specific goods, that circumstance will not prevent the property in them passing to the purchaser, and if it be simply a warranty, will not entitle the purchaser to refuse to accept [? receive] the goods, or to return them, merely because the warranty is not fulfilled; and in order to entitle the purchaser so to refuse or to return them, it must, in the case of specific goods, be a term of the contract that he shall be at liberty to do so.

"In the case of executory contracts, where the goods are not ascertained or may not exist at the time of the contract, from the

[1] 1 B. & S. 299, stated *supra*, 406, *et seq.* [2] L. R. 7 C. P. 438, 449, *et seq.*

nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself; but, where certain goods have been selected and appropriated by the seller, and have been approved and assented to by the buyer [? accepted by him], then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts, something more would generally remain to be done, such as, for instance, selection or appropriation, approval, and delivery of some kind, before the property would be considered as intended to pass, and upon that taking place, the property might pass if it was intended to do so, equally as in the case of a contract for specific and ascertained goods. Lord Wensleydale, in the case of Dixon *v.* Yates,[1] put the case of a sale of a specific chattel upon the same footing as the sale of an unascertained chattel after delivery, for the purpose of showing that the property vested in the latter case upon delivery, and in the former by the contract itself. And see also upon this subject, Alexander *v.* Gardner,[2] Aldridge *v.* Johnson,[3] which was confirmed by Langton *v.* Higgins;[4] also the judgment of Parke, B., in Wait *v.* Baker,[5] Brown *v.* Hare[6] in error, and Tregelles *v.* Sewell.[7]

"In cases where, under an executory contract, goods are sent by the vendor which do not come within the general description of those contracted for, the purchaser may refuse to receive or may reject them; and equally so if there be any other condition in the contract which is not complied with; so, in like manner, if a fraud has been practised by the seller, then, upon discovery of the fraud, and within a reasonable time, and if nothing has been done by the purchaser to alter the position of the vendor, the purchaser may reject the goods.

"In the judgment of the Court of Exchequer Chamber delivered by my Brother Williams in the case of Behn *v.* Burness,[8] the law is thus laid down: 'In cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed; still, if he receive the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages.'"

[1] 5 B. & Ad. 340.
[2] 1 Bing. N. C. 671.
[3] 7 E. & B. 835.
[4] 4 H. & N. 402.
[5] 2 Ex. 1.
[6] 4 H. & N. 822.
[7] 7 H. & N. 574.
[8] 3 B. & S. at p. 756.

And yet, at common law, although the property in the goods, whether under an immediate or executory contract of sale, may have passed, there may still in each instance be a lien for the purchase-money, and a right to stop *in transitu*, and the purchaser may not be entitled to possession without payment of the price.[1]

All this we think is quite applicable to acceptance under the statute, and we see no escape from the conclusion that where there is a contract of sale for specific goods which passes the property to the goods at common law, that that is itself such an acceptance of the goods as the subject of the purchase, as will cause the contract to be deemed good within the exception to the seventeenth section of the statute, where there has also been such an actual receipt of them by the vendee as puts an end to the lien and extinguishes the right of *stoppage in transitu* in the specific goods.

The quite recent case of Grimoldby *v.* Wells[2] shows how very unsettled the English judges are as to what constitutes an acceptance to satisfy the exception in the seventeenth section of the statute. The case on the question of acceptance is one of the very simplest conceivable, and although it was the leading question involved in the case, a correct decision on which would have rendered unnecessary a decision on the very different question which they did undertake to decide; and which latter question, on their assumption that there was an acceptance of the whole of the goods within the meaning of the statute, we confidently submit they decide wrongly.

The action was brought in March, 1874, to recover the price of four quarters of tares sold by the plaintiff to the defendant by sample, by a verbal contract. The bulk was delivered on October 9, 1873, to the defendant. The defendant and plaintiff lived about nine miles apart, and the tares were sent part of the way in a cart belonging to the plaintiff, and then placed in a cart belonging to and sent by the defendant, and taken by his servant into his barn, where they remained at the time of the trial of the action. On the day of the delivery the defendant inspected the bulk, and immediately notified the plaintiff verbally and by letter, that the tares were in his (the defendant's) barn; that they were bad; that he would not have them, nor pay for them, and that the plaintiff might do what he liked with them.

Here, under all the authorities, including Nicholson *v.* Bower[3] and Smith *v.* Hudson,[4] there is not a tittle of evidence to show

[1] *Per* Bovill, C. J., in Heilbutt *v.* Hickson, L. R. 7 C. P. at p. 451. And see also Parker *v.* Palmer, 4 B. & Ald. 392, 393, *et seq.*

[2] L. R. 10 C. P. 391.

[3] 1 E. & E. 172.

[4] 6 B. & S. 431.

an acceptance of the goods, or any part ot them; the County Court judge on the trial having found as a fact that the tares were not equal to the sample. There was an actual receipt of the goods, but clearly, under the meaning of the term in the statute, no acceptance of them. Nor did the additional facts of the case establish an acceptance of the tares. These were that the defendant did not return, or offer to return, the tares to the plaintiff; nor did he place them in neutral custody, but they remained in his barn as before stated. Early in January, the defendant, for the purpose of showing that the tares were inferior to sample, had one of the sacks opened and dressed over, and the result of the dressing was produced in court. These facts, instead of showing an *acceptance* of the tares, showed a prompt and continuous *rejection* of them. Had the goods been equal to sample, then the case would have been open to the consideration of the very different question to which we have previously adverted, as to whether the purchase of the specific goods by sample, which identical goods so purchased were actually received, was not in itself an acceptance of them, — an assenting, a recognising, an approving, a taking to them as the very subject of the contract, within the meaning of the statute; which, on their actual receipt, would cause the property in them to pass, as, in the purchase of specific, ascertained goods at common law, would result from the purchase itself. But, in this case, they were not equal to sample, and, therefore, were not the subject of the purchase at all; and then, in fact, instead of being subsequently accepted, were expressly and continuously rejected and refused acceptance as the subject of the purchase by sample, — being not the subject-matter that, by the terms of the contract, it was agreed should be accepted as the very subject of the purchase.

It was contended for the defendant, and we think with entire, and, at last, literal correctness, that there was no sufficient evidence of an acceptance within the Statute of Frauds, and that, the goods not being equal to sample, the defendant was entitled to reject them. The County Court judge held that there was an acceptance within the Statute of Frauds; and, relying on his view of the holding in Couston *v.* Chapman,[1] which he purported to follow, also held that the defendant on rejecting the goods must return them, or place them in neutral custody, and that having retained them in his own possession he was liable to pay for them.

The case was taken on appeal to the Common Pleas. The judgment in that court is one of the most remarkable which we have found in the records of any English court, — going back to

[1] L. R. 2 Sc. & Div. 250.

the very earliest times. Obviously, right on the face of the case, for decision, was the question as to whether there was an acceptance of the tares (which, differing from those contracted for, had never been assented to or "accepted" at all) within the meaning of the statute; and on the correct decision of that question the case would have ended. But the main question in the case was avoided. Lord Chief Justice Coleridge said, "The first question is whether there was an acceptance within the Statute of Frauds. It is not necessary in the view we take to decide this, but I should say that there was evidence of such an acceptance." In what it consisted there is no intimation. Brett, J., too, said, "There are two points in this case: *First*, whether there was an acceptance of these goods within the Statute of Frauds. . . . As to the first point I decline to give any opinion, because it is unnecessary, as I think, to decide it. . . . In the present case I assume that there was an acceptance which did make a binding contract within the Statute of Frauds." And Denman, J., "The only other question raised is whether there was an acceptance within the Statute of Frauds. On this I express no opinion, as in the event it becomes unnecessary to do so." They then held, that, assuming that the tares had been accepted (the whole case showing that they were thereby assuming that there had been an acceptance of the whole bulk of the tares), the defendant, after such acceptance, could reject them, and so rejecting them was not bound to return them or place them in neutral custody. Their reliance was placed on the *obiter dictum* of Lord Campbell in Morton *v.* Tibbett,[1] examined by us, *supra*, where it was fallaciously laid down, in effect, that after there had been an *acceptance* of the whole of the goods to satisfy the statute there could be a subsequent *rejection* of them; that is, that they could be both accepted and rejected!

They also relied on Lucy *v.* Mouflet[2] for the right of the vendee to *reject goods after they had been accepted.* But that was not a case under the Statute of Frauds at all; and, further, it was there found that the vendee had *not* accepted the goods; and the court held that there was evidence in the case to warrant such finding. We think it is entirely too clear for argument, that, in Grimoldby *v.* Wells,[3] there was no acceptance (recognizing, assenting to, taking to as the very subject of the contract) of the bulk of the tares which were actually received; and that, on the other hand, had there been an acceptance and actual receipt *of the whole of the goods*, so that the contract under the statute was to be "deemed good," the vendee then could not have rejected them;

[1] 15 Q. B. 428.
[2] 5 H. & N. 293.
[3] L. R. 10 C. P. 391.

and therefore the question as to the duty of the vendee to return the rejected goods was a complete *non sequitur*, as there never had been an acceptance of them to make a completed contract which could be enforced.[1]

The distinction is properly taken by Brett, J., in Marshall *v.* Green,[2] between the "acceptance" and the "actual receipt" of the statute. In this case the defendant, by a verbal contract, purchased certain growing trees (held under the facts to be personal chattels) for £26, of the plaintiff, on the terms that he, the defendant, should remove them as soon as possible. The defendant accordingly cut down some of the trees, and agreed to sell the tops and stumps to a third person. The plaintiff then countermanded the sale, and prohibited the defendant from cutting down the rest of the trees. Brett, J., said, "It was not denied in argument that there was an acceptance. The only question, therefore, is whether there was evidence of a receipt. Though there was an acceptance, there was no actual carrying away of the things from the premises of the seller." And, "Here, by cutting down the trees, the defendant actually did something to them which, apart from the sale over of the toppings, amounted, in my opinion, to an actual receipt of them."

We think the case of Kibble *v.* Gough,[3] in effect, sustains the

[1] Browne in his very excellent work on the statute, § 340, says: "It is hardly necessary to remark [we should scarcely think so] that an acceptance or receipt once intelligently made cannot be afterwards revoked, and its effect avoided." In Buckingham *v.* Osborne, 44 Conn. 133, which was a question as to the right of rescission of a contract rendered valid by an acceptance and actual receipt under the statute of frauds, Park, C. J., in delivering the judgment of the court, said: "There is nothing in the finding tending to show that the acceptance was conditional; that the horse was received for the purpose of being examined in order to ascertain whether he answered the terms of the contract; but, on the contrary, the finding is that the tender and acceptance were absolute; and this being so, the contract could not be rescinded except by an agreement of both the parties to that effect. If the defendant had accepted the horse as his property when the plaintiffs returned him, the contract would have been rescinded. But this was never done. When the plaintiffs returned the horse the defendant refused to receive him, and afterwards brought his suit for the purchase-money, and sold the horse as the property of the plaintiffs. This being so, the horse continued to be the property of the plaintiffs from the time he was delivered to them, notwithstanding their efforts to rescind the contract. The want of mutuality in the attempted rescission prevented a retransfer of the property." See also Jackson *v.* Watts, 1 McCord, 288. As we have pointed out, the confusion in the English courts on the subject has arisen from their having failed so largely to distinguish between the acceptance and the actual receipt of the statute, and in failing to discriminate between the effect of accepting and actually receiving a part of the goods, which only binds the contract, as in the case of the payment of earnest, or of a memorandum of the contract in writing, and that of accepting and actually receiving the whole of the goods; which latter not only causes the contract to be deemed good, but absolutely vests the property and possession in and of the goods in the vendee; and that so effectually that while, on the one hand, the vendor's lien as well as his right to stop the goods *in transitu* is gone; on the other hand, the vendee has no power to rescind a contract of his own mere motion, which has irrevocably become binding, outside of the question of fraud, both as to himself and the vendor.

[2] 1 C. P. Div. 35, 43.

[3] 38 L. T. N. S. 204.

opinion we have more than once intimated in the investigation of this subject, and which accords with the general trend of our reasoning, — that as the "accepting" [1] of the statute is nothing more than the assenting to the goods which are actually purchased as the very subject of the particular contract; therefore, as it was held in Cusack *v.* Robinson,[2] and approved and followed in The Bog Lead Mining Co. *v.* Montague,[3] a purchase of specific goods is itself an acceptance of those very goods within the meaning of the statute,[4] entirely independent of their actual receipt. So, the buying goods by sample is the accepting, assenting to, recognizing, taking to, as the very subject of the contract, the specific goods represented by the agreed sample; and, therefore, if, on the actual receipt of the goods, the bulk is found to be the same as the sample, as *they are the identical goods which have been purchased* (that is, accepted, assented to, recognized, and approved by their very sale and purchase as being the specific goods bought), they have been accepted, and cannot be rejected. But if, on the other hand, the bulk of the goods, after their receipt, shall have been found not to accord with the sample, then they have not been accepted, and may be rejected, in the absence of *laches* on the part of the vendee after their receipt, and in the absence of any dealing with them from which an acceptance may be implied. It is from the fact that both of these propositions are true, — namely, that where the very goods which have been accepted have been actually received, they cannot be subsequently rejected; but that where the very goods which have been accepted have not been actually received, but others in lieu of them, which have never been accepted, have been received, then these latter can be rejected, after examination, because they have never been accepted, and, therefore, notwithstanding the actual receipt, the requirements of the statute have not been met, and there is no

[1] The following from a periodical (*The Quiver*) is apt: "But for old age to be happy, it must be a time of *acceptance* [? assent]. Old age fought against is miserable; old age *accepted* [recognized, assented to], is calm and peaceful." And from another (*The Young Churchman*): "Let each duty be done for the Master nobly and well, that your work may be fair and faultless, and worthy of his *acceptance*." Here, acceptance means more than mere receipt.

[2] 1 B. & S. 299.

[3] 10 C. B. N. S. 481.

[4] While a delivery of a sample which is not delivered as a part of the very bulk of the goods, does not satisfy the requirements of the statute as to an actual receipt of a part of the goods, Klinitz *v.* Surry, 5 Esp. 267; the sale of specific goods by sample was a sufficient acceptance of the goods at common law as the subject of the sale. See Dixon *v.* Yates, 5 B. & Ad. 313; Parker *v.* Palmer, 4 B. & Ald. 387, 392 *et seq.*; Tye *v.* Finmore, 3 Camp. 462; Yates *v.* Pym, 6 Taunt. 446; Cooper *v.* Elston, 7 T. R. 14. In this last case it was admitted by counsel that the sale by sample was the same as an immediate sale of the goods if they had been on the spot. In Lorymer *v.* Smith, 1 B. & C. 1, it was held that the buyer of a parcel of wheat by sample has a right to inspect the whole in bulk, at any proper and convenient time; and if the seller refuses to show it, the buyer may rescind the contract.

good contract with respect to those goods which have been actually received, — that so much embarrassment has arisen.

Both of these propositions we find are fully sustained by the latest English cases, — Kibble *v.* Gough,[1] Rickard *v.* Moore,[2] and Page *v.* Morgan (A. D. 1885).[3] And yet these cases fairly abound with errors arising out of Lord Campbell's utterly unsound proposition in Morton *v.* Tibbett,[4] that the same goods under the Statute of Frauds can both be accepted and rejected, — a position which he himself evidently found so utterly untenable as a sound rule of construction of the statute, as to lead him to the expression of a wish, in the subsequent case of Marvin *v.* Wallis,[5] that the statute should cease to exist.

In Kibble *v.* Gough [6] there was a sale of a quantity of barley, by sample, at an agreed price. After its actual receipt, after examination, it was rejected by the vendee on the ground that it was not equal to sample, the vendee requiring the vendor to take the barley back, and, on the latter refusing to do so, notified him that the barley was held at his (the vendee's) warehouse for and at the risk of the vendor. In an action for the price, the jury found that the barley was equal to the sample; and hence, that it was the specific goods which the vendee had purchased from the vendor, and found for the plaintiff.

The simple *ratio decidendi* of this case is that a sale by sample being a sale of specific goods, those very goods are assented to and accepted as "a recognition of the contract between the parties" [7] for the sale of these specific goods; and hence, if these very goods are actually received by the vendee, they being the very goods he has purchased, assented to, recognized, accepted, he cannot, after he has actually received them, reject them.[8]

[1] 38 L. T. N. S. 204.
[2] *Ib.* 841.
[3] 15 Q. B. Div. 228.
[4] 15 Q. B. 428.
[5] 6 E. & B. 726, 736.
[6] 38 L. T. N. S. 204.
[7] *Per* Bramwell, L. J., at p. 205.
[8] Thus affirming the principles established by Cusack *v.* Robinson, 1 B. & S. 299, recognized and affirmed in The Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481, and, in effect, reversing Nicholson *v.* Bower, 1 E. & E. 172, and Smith *v.* Hudson, 6 B. & S. 431. In the Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481, 490, the analogy the court finds between a sale of shares of stock and specific goods is equally applicable to the sale of specific goods by sample, as it affects the "acceptance" of the statute of frauds. The court say: "Now it appears to us very clearly that a purchase of shares is analogous to that of a specific chattel, because the very thing to be purchased is ascertained by the offer contained in the letter of application, and the offer is subject to no other condition than the assent of the persons to whom it is made. Each share is a right to a fixed proportion of the profits of an existing undertaking, subject to the payment of an ascertained amount of money when called for. Each share gives the same rights as every other; and there is not necessarily even the distinction of separate numbers until the register is made up, if even then. The directors, therefore, by assenting to the letter of application in its terms, and allotting to the applicant so many shares as he has applied for, did give him the very thing for which he had asked, and of which he had by anticipation testified his acceptance." In the same way, under the statute, by the receipt of the very goods which have been

But while this is the clear holding of the case, there is the usual confounding of the term "accept" with "actually receive," as though the latter necessarily included the former, Brett, L. J., on the argument, actually asking: "Suppose there was no sale by sample, but merely a verbal agreement, then does not the delivery and receipt include acceptance?" Most certainly it does not, except where there is a sale of specific goods by sample or otherwise; and then the very purchase, as we have claimed, and as the cases, including Kibble *v.* Gough,[1] show, being of specific goods, itself constitutes an assent to and acceptance of those identical goods as, to use again the words of Bramwell, C. J., in this case, "amounts to a recognition of the contract between the parties," — exactly what the acceptance of the statute is as distinguished from the actual receipt. But the case actually holds that the sale was a sale of ascertained goods, and that, in such a case, on the actual receipt of them, the property in them passed at once, they being the actual goods which had been purchased; that the acceptance to satisfy the statute amounts to a recognition of the contract between the parties; and that the specified goods purchased having been received as and being equal to sample, after their actual receipt there was no right of rejection by the vendee; and hence the verdict was sustained.

Rickard *v.* Moore[2] illustrates the correctness of the second of our propositions, stated *ante*. In this case specific goods were sold by sample, and goods were actually received, but were found not equal to sample (the jury also finding this fact), and the vendee rejected them. The court sustained the finding. This, too, accords with the view we have expressed, and with our reasoning throughout this protracted and exhaustive examination of the subject. The case is not only clearly distinguishable from Kibble *v.* Gough,[3] but we think both of the decisions are correct, the specific goods which were bought by sample being accepted and actually received in the one case, while in the other the goods which were actually received were not the goods which were purchased, assented to, accepted, and recognized as the subject of the contract, — not being equal to sample, and, therefore, not being the bulk of the very goods which were bought.

In the very latest English case, Page *v.* Morgan[4] (A. D. 1885), in the Court of Appeal, affirming the judgment of the Queen's

purchased by sample, the vendee gets the very subject which he has assented to, or accepted, as the subject of the sale, quite as much as though at the time of the purchase there had been specific, ascertained, designated, separated, goods.

[1] 38 L. T. N. S. 204.
[2] *Ib.* 841.
[3] *Ib.* 204.
[4] 15 Q. B. Div. 228.

Bench Division, there is a still further confirmation of the correctness of the positions we have taken throughout this Part,[3] although in this last case, as in so many other of the English cases, there is, as usual, the want of appreciation of the correct meaning of the term "accept" of the statute. Arising out of this, they seem puzzled over the holding in Kibble *v.* Gough [1] as compared with that in Rickard *v.* Moore;[2] and doubt is expressed [3] whether these cases can be reconciled. But Baggally, L. J., though laboring under the same delusion as Lord Campbell in Morton *v.* Tibbett,[4] that there could be an acceptance under the statute of the whole of the goods, which was not an acceptance, but that, notwithstanding such an acceptance, there could be its exact opposite, a rejection, yet did, as did Bowen, L. J., recognize the clear, undoubted distinction between the two cases, — that in Kibble *v.* Gough "the jury found that the goods were equal to sample," while in Rickard *v.* Moore "the jury found that they were not equal to sample;" hence, that in the one case the jury found that the very goods which had been purchased, assented to, recognized, approved, accepted, as the very subject of the contract, had been actually received, while in the other case they found that the goods which had been actually received were not the goods which had been purchased; and, therefore, that, notwithstanding such actual receipt of such goods, those goods had never been assented to, recognized, approved, as the very subject of the purchase; and, therefore, never having been accepted, could be rejected. Both of these cases in this aspect are thoroughly well decided without, in either of them, the absurdity of Lord Campbell, Lord Denman, Lord Coleridge, and so many other of the English judges, being necessary to be adopted or sustained, that there could be an acceptance of goods which had been actually received, and at the same time there be, after such actual receipt, the exact opposite of such acceptance, a rejection of the very goods which had been accepted.

In Page *v.* Morgan,[5] the defendant bought of the plaintiff, by verbal contract, a quantity of wheat, the sale being by sample. The wheat was sent by the plaintiff to the defendant on a canal barge, arriving at the defendant's mill on the evening of March 25; and at eight o'clock on the morning of the 26th, some of the sacks containing the wheat were, by direction of the defendant's foreman, hoisted up out of the barge on to the mill and examined by him. After twenty-four sacks had been hoisted up and exam-

[1] 38 L. T. N. S. 204.
[2] *Ib.* 841.
[3] See *per* Brett, M. R., at p. 232.
[4] 15 Q. B. 428.
[5] 15 Q. B. Div. 228.

ined, the foreman sent for the defendant, who examined these and thirty-eight more sacks; and then, at nine o'clock of the same morning, told the bargeman to send up no more, claiming that the wheat was not equal to sample. The same day he notified the plaintiff that the wheat was not equal to sample, and that he should not take it. Some days afterwards the wheat taken into the mill was returned to the barge, and remained there, the plaintiff refusing to take the wheat away. It was finally sold under a judge's order, and the proceeds paid into court. In an action for the price of the wheat, or, in the alternative, for damages for its non-acceptance, the jury found that the wheat was equal to sample, and the verdict was for the plaintiff.

Here, if the purchase of the specific goods by sample had not been in itself,[1] when the identical goods purchased were subsequently in fact received, an acceptance of them, then, clearly, there was no acceptance of them at all, as the rejection of the goods after their receipt was prompt and unquestionable. And, apart from the acceptance *ab initio*, there was here, too, a much more decided rejection of the goods, in every sense, than there was in Rickard *v.* Moore,[2] where it was held that there was no acceptance of the goods within the exception of the seventeenth section of the statute. But the difference simply was, that while in Page *v.* Morgan the goods accorded with the sample, and, therefore, were the identical goods purchased, and, as the designated goods, were approved, assented to, recognized, accepted, as the goods which were actually purchased under the verbal contract; in Rickard *v.* Moore the goods actually received did not agree with the sample, and hence, notwithstanding the actual receipt, as they had never been approved, assented to, recognized, accepted, as the goods which were actually purchased, as they had not been accepted they could be rejected; thus differing from

[1] And see Hinde *v.* Whitehouse, 7 East, 558, where a sale by sample was held sufficient at common law to pass the property in the specific goods sold; and the delivery of the sample, as a part of the bulk, was held to be a sufficient receipt of a part of the goods sold to meet the requirements of the statute, and to make the purchaser liable for the price of the whole of the goods sold, as he would have been at common law *dehors* the statute, although the goods were destroyed by fire without any actual manual transmission of the possession having been made to the purchaser. Lord Ellenborough, in this case, said: "Although the sample be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, as a part delivery of the thing itself, as soon as, in virtue of the bargain, the buyer should be entitled to retain, and should retain it accordingly." Here the sale of specific goods by sample was held to be a sufficient sale; to be, at common law, an acceptance of, or assent to, the actual goods sold, so as to pass the property in them; and equally so, therefore, within the same meaning of the term acceptance in the statute of frauds, does it satisfy the accepting of the statute. And see Noy's Max. 88, as to property passing by the sale of specific goods.

[2] 38 L. T. N. s. 841.

the case of Page *v.* Morgan, where the goods, having been accepted, could not, having been actually received, be rejected. That is, they could not in this case be both accepted and rejected; unlike the other case, where, not having been accepted, they could be rejected, the acceptance of a sample differing from them not being an acceptance of the different goods received.

But these cases were necessary to sustain our whole reasoning, and to show its soundness and consistency, while, on the other hand, showing the unsoundness and radical fallacy of the *obiter dictum* of Lord Campbell in Morton *v.* Tibbett,[1] and of the utter confusion which has arisen in the English cases resulting from treating the accepting and the actual receiving of the statute as being in effect the same; and in their failing to discriminate between the effect of an actual receipt of the whole of the goods bought under a verbal contract, where the acceptance, *ab initio*, covers the very goods actually received, and where it does not. Accepting does not mean actually receiving; and accepting specific goods purchased under a contract does not mean accepting goods which have not been purchased at all. There may be an acceptance without an actual receipt, and there may be an actual receipt without an acceptance. There may be an acceptance of specific goods purchased, and there may be a refusal to accept goods which are not the specific goods purchased. But it is a contradiction in terms and a gross absurdity to say, with respect to the same goods which have been actually received, that they have been both legally accepted and legally rejected.

It is only necessary for us to add, in closing this Part on this important subject, that the result of the decisions in these latest English cases of Kibble *v.* Gough,[2] Rickard *v.* Moore,[3] and Page *v.* Morgan,[4] is to fully justify our criticism[5] of Nicholson *v.* Bower[6] and Smith *v.* Hudson;[7] both of which latter cases were sales of specific goods by sample, which goods were actually received by the vendees, so that the *stoppage in transitu* was gone; no question being raised in either of them as to the goods received not being equal to sample, while in one of them they were expressly found to be equal to sample.[8] As in both of these cases the very goods

[1] 15 Q. B. 428.
[2] 38 L. T. N. S. 204.
[3] *Ibid.* 841.
[4] 15 Q. B. Div. 228.
[5] *Ante*, p. 400, *et seq.*
[6] 1 E. & E. 172.
[7] 6 B. & S. 431.
[8] Where goods have been sold by sample, and the sample has been delivered as and for a part of the bulk of the goods sold, admittedly, in all the cases, this is an acceptance and receipt of part of the goods sold to take the case out of the statute, so that, on the actual delivery of the balance of the goods, the property and possession in such balance are in the vendee permanently, unless rejected by him rightfully as not according to the sample. But if he do not reject them, it seems to us clear that the vendor, having delivered them as and for the goods which he has sold, and which have reached the

which were purchased, thereby being assented to, recognized, approved of, accepted, were in effect held to have been actually received, — clearly and unquestionably so in Nicholson *v.* Bower, — these cases are no more in harmony with the holding in Kibble *v.* Gough, Rickard *v.* Moore, and Page *v.* Morgan, than we considered them to be in harmony with the well-decided cases of Cusack *v.* Robinson[1] and The Bog Seal Mining Co. *v.* Montague,[2] stated by us, *supra*, p. 406 *et seq.*[3]

ultimate possession of the vendee, so that the lien is gone and the *transitus* at an end, cannot set up the claim that there has been no acceptance of the balance of the goods, on the ground that if the vendee found that they did not accord with the sample the vendee might reject them. If so, in any other case of the sale of goods where there had been an acceptance and a receipt of part of the goods by the vendee, taking the case out of the statute, and the balance of the actual goods sold were delivered to the vendee, the vendor, at his election, could take these goods back again, although literally the goods sold, because if they were not the goods sold, the vendee might himself reject them. We think this is utterly unsound. In the same way, where there has been a sale by sample, as in Smith *v.* Hudson, 6 B. & S. 431, the very act of buying goods by sample being an assent to the goods represented by the sample as being the very subject of the purchase, we think, after an actual delivery by the vendor to the vendee, and an actual receipt by the vendee, so that the right of *stoppage in transitu* is gone, and the goods delivered have been received and retained by the vendee without objecting to them as not according to sample, that the vendor cannot reclaim the goods simply on the ground that if they did not accord with the sample the vendee might reject them, particularly where there is not a tittle of evidence that they did not accord with the sample, as in Smith *v.* Hudson, 6 B. & S. 431; or, as in Nicholson *v.* Bower, 1 E. & E. 172, where the evidence was conclusive that the goods did accord with the sample, so that even the vendee himself could not have rejected them.

[1] 1 B. & S. 299.

[2] 10 C. B. N. S. 481.

[3] The case of Cross *v.* O'Donnell, 44 N. Y. 661, holds, on the question of acceptance, precisely the same doctrine as the case which has been referred to by us as in entire harmony with our views, — Cusack *v.* Robinson, 1 B. & S. 299. In each of these cases the acceptance of the statute is clearly distinguished from the actual receipt required. In Cross *v.* O'Donnell, the purchase was of specific goods deliverable at a vessel by the plaintiffs for the defendants. The goods having been lost in course of the transit by the sinking of the vessel, the defendants refused to pay for them. An action was brought in New York for the price of the goods. The contract was made in Maryland; but the statutes of fraud in both of these States are substantially the same, and similar to the English statute, as to the acceptance and receipt required. The court held that, under the facts of the case, the delivery to the vessel was a receipt by the purchasers; and, correctly distinguishing the acceptance from the receipt, they held that, the purchase being of specific goods, there was an acceptance of them. Whatever doubt there may be as to the correctness of the holding in the case, as to the compliance with the actual receipt required by the statute, and in connection with which the court do not manifest the same intelligence as they do on the cognate subject of acceptance, on this latter subject we think they are entirely right. On the question of the sufficiency of the acceptance, Earl, C., in delivering the unanimous judgment of the court, says: "There was no note or memorandum of the contract, and no part of the purchase-money was paid by the buyers; and hence, unless the buyers accepted and received the hoops, within the meaning of the statute, the contract was void. *A purchaser may accept without receiving, and he may receive without accepting; and in order to comply with the statute of frauds, he must both accept and receive.* Here the defendants accepted the hoops. One of them saw them in the plaintiffs' yard; *and the contract had reference to this particular lot of hoops which the plaintiffs finally delivered.* There is nothing in the statute which requires that the accepting and receiving shall be at the same time. Either may precede the other; and, after both have concurred, the statute has been complied with, and the contract becomes operative and valid. *The defendants agreed to take these identical hoops;* and after receiving them and thus fully complying with the

statute, they could not reject them upon any objection to their quality." And, again, in considering the question as to whether the receipt by "*the agents of the defendants for the purpose of receiving the hoops from the plaintiffs*" (*a*) was the receipt of the defendants, they say: "It is not necessary to determine in this case that a mere carrier designated by the buyer can both accept and receive for him, so as to make a compliance with the statute; but I can find no reason founded upon principle or authority to doubt that, *after the buyer has accepted the article purchased*, a carrier, designated by him to take and transport it, can bind him as his agent by receiving it." (*b*)

From the confusion which, as we have shown, exists in so many of the old English cases in failing to discriminate between the acceptance and the actual receipt of the statute, it is not at all surprising that similar confusion is to be found in the cases in this country, where the rule so generally prevails of following the English decisions. Hence it will be found that, in this country as in England, cases abound where acceptance is treated as though it could not be separated from the actual receipt of the statute. In the very recent case (A. D. 1887), in the Supreme Court of the United States, of Hinchman *v.* Lincoln, 124 U. S. 38, 49, we find the court using such language as that "acceptance implies delivery," when, of course, it implies nothing of the kind; and, as is well shown by Cusack *v.* Robinson, 1 B. & S. 299, in England, and by the above-cited case of Cross *v.* O'Donnell, 44 N. Y. 661, in this country, the acceptance may take place entirely independent of delivery, which implies not acceptance but receipt. The language used by the Supreme Court of the United States in Hinchman *v.* Lincoln, 124 U. S. 38, 49, is quoted from Shindler *v.* Houston, 1 N. Y. 261, 265, where it is said: "In a word, the statute of fraudulent conveyances and contracts pronounced this agreement, when made, void unless the buyer should 'accept and receive some part of the goods.' The language is unequivocal, and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance. The defendant, however, said nothing and did nothing subsequent to the agreement, except through his agent, to repudiate the contract. There was consequently no evidence of a delivery." Hence, if acceptance had been used in its legitimate sense, and not as synonymous with the actual receipt of the statute, the conclusion would be that, as "acceptance implies delivery," and as there was in this case "no evidence of a delivery," there could, therefore, be no evidence of acceptance. All of this confusion is the result of adopting, as was done in this case, the language of the English cases, as in Phillips *v.* Bistolli, 2 B. & C. 511, 515, cited in Shindler *v.* Houston, 1 N. Y. at p. 265, the English court there using the term "actual acceptance" where they meant actual receipt, treating the acceptance of the statute as being either meaningless or as covered by the actual receipt. Thus: "In order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance [!] by the latter, with an intention of taking to the possession as owner. It lies upon the plaintiff in this case to make out that there was such delivery and acceptance." And so on through the whole judgment, the term "actual acceptance" being used throughout it as though it were simply surplusage, or else was identical with the "actual receipt" of the statute. And yet, in Phillips *v.* Bistolli, under such well-decided cases on the acceptance of the statute, as Cusack *v.* Robinson, 1 B. & S. 299, and Cross *v.* O'Donnell, 44 N.

(*a*) If they were "*the agents of the defendants*" to receive the goods from the plaintiffs, then, of course, their receipt was the receipt of the defendants; and on the receipt of the goods by the defendants' agents, the *transitus*, as between the plaintiffs and defendants, was ended, and the former had no longer a lien for the price, nor the right to exercise *stoppage in transitu*. The language of the statute is, "*actually receive;*" and it is clear that whether this *actual* receipt be by the purchaser of the goods himself, or by his agent, it is equally as effective and conclusive for all purposes in the one case as in the other. We have already discussed this question in the text, and shall refer to it again in a later volume of this work, in discussing the general subject of *stoppage in transitu*.

(*b*) Obviously, then, if and when the carrier binds his principal as the latter's agent for receiving the goods, the receipt of the agent is the receipt of the principal, and, therefore, the principal having "actually" received the goods, the goods have passed into his possession and control, the *transitus* as between seller and buyer has terminated, and, therefore, the right of *stoppage in transitu* has ceased to exist. The case on this branch of the subject is, we think, very badly reasoned, and not by any means good law.

Y. 661, there was no question as to the acceptance at all, as the case was one of specific articles, the very purchase of which was the accepting, the assenting to, as the very subject of the purchase, and the only question was whether the possession of the goods for a few minutes was a receipt to satisfy the statute. And so in Shindler *v.* Houston, 1 N. Y. 261, itself, the acceptance of the goods, as the specific subject of the purchase, was undoubted, the whole question being as to whether there was "a transfer of the possession." — the actual receipt of the statute. This is well shown by the head-notes of the case, which are as follows: "Plaintiff and defendant bargained respecting the sale by the former to the latter of a quantity of lumber, piled apart from other lumber, on a dock, and in view of the parties at the time of the bargain, and which before that time had been measured and inspected. The parties having agreed as to the price, the plaintiff said to the defendant, 'The lumber is yours.' The defendant then told the plaintiff to get the inspector's bill and take it to one House, who would pay the amount. This was done the next day, but payment was refused. The price was over fifty dollars. Held, in an action to recover the price, that there was no delivery and acceptance [!] of the lumber within the meaning of the statute of frauds, and that the sale was therefore void. It seems that to constitute a delivery and acceptance [!] of goods, such as the statute requires, something more than mere words is necessary. Superadded to the language of the contract, there must be some act of the parties amounting to a transfer of the possession, and an acceptance thereof by the buyer. The case of cumbrous articles is not an exception to this rule." All this shows entire failure to appreciate the acceptance of the statute, as there distinguished from the different entity, — the actual receipt. The error of the courts in this country, like that which we have shown has been so persistently committed by the English courts, is well illustrated by the New York case of Ham *v.* Van Orden, 4 Hun, 709. There, as in the previous New York case of Cross *v.* O'Donnell, 44 N. Y. 661, there was a purchase of specific articles, which, as we have seen, is an acceptance of them within the language of the statute; an assenting to them as the very subject of the purchase. The court, in Ham *v.* Van Orden, 4 Hun, 709, at p. 761, in failing to distinguish between the acceptance and the actual receipt of the statute, make dreadful confusion in the matter. They say: "It is said that the acceptance and the receiving may be at different times. Cross *v.* O'Donnell, 44 N. Y. 661. Even if this be correct, it cannot be said that, in the present case, there was any acceptance of the goods by the act of Watson. Assuming that the goods were to be delivered to the defendant at the plaintiff's house, yet, as the contract was verbal, it was necessary that he should manifest his acceptance by some act. So that the delivery of the goods by the plaintiff to Watson, that they might be carried to the defendant's house, was not an acceptance by him. And, indeed, the plaintiff does not argue that the delivery to Watson was an acceptance, but that the acceptance had preceded. No such acceptance, as is before said, had in fact taken place, and Watson had no authority from the defendant to accept." The contention of the plaintiff was thus stated by the court: "The plaintiff claims that the defendant accepted the furniture, because, in the presence of the furniture, he agreed to buy it, and then that he received it the next day by its delivery to Watson, alleged to be his agent for that purpose." Under the authority of the well-decided cases on the subject of acceptance, of Cusack *v.* Robinson, 1 B. & S. 299, and Cross *v.* O'Donnell, 44 N. Y. 661, an acceptance, at least by such facts, would well be shown, and would not sustain the answer of the court. "But the mere words of the contract for sale are not acceptance. Acceptance requires that the vendee should also act (not talk), and that his act should be of such a nature as to indicate that he *received and accepted* [the whole requirements of the statute being here met; not the acceptance alone] the goods delivered as his property. Rodgers *v.* Phillips, 40 N. Y. 519, 524."

Smith *v.* Stoller, 26 Wis. 671, although not verbally discriminating between the acceptance and the actual receipt of the statute in very clear terms, does hold, where there was a sale of goods by sample for more than $50, and an actual receipt of the goods by the defendant, but within a reasonable time after he examined the goods he refused to keep them, that if the defendant received the goods with the intention of keeping them if they agreed with the sample, and they did agree with the sample, this was an acceptance of them. Here the receipt is one thing, the acceptance quite another. In Bacon *v.* Eccles, 43 Wis. 227, in an action by the vendees for breach of a contract to deliver goods, the question arose whether there had been an acceptance and receipt of the goods to take the case out of the statute. The sale was of specifically designated goods, "Canton C. C." sugar. The vendees received the sugar; but rejected it on the ground that it did not

come within the description of "Canton C. C." sugar. The court on the trial, going beyond the holding in Smith *v.* Stoller, 26 Wis. 671, instructed the jury that if the plaintiffs received the goods with the intention of accepting them, the case was taken out of the statute, even though the quality of the goods was not the same as that of those purchased. The jury found for the plaintiffs. The effect of such finding is remarkable. It really involves this contradiction: That the plaintiffs received and accepted the goods; the statute was satisfied and the contract was performed; and, on the other hand, that the plaintiffs did not accept, but rejected, the goods; the contract was not performed, and the plaintiffs were entitled to damages for the breach of contract; *i.e.*, that the same goods were accepted and rejected; the statute was satisfied by the acceptance, and, at the same time, the plaintiffs, having rejected the goods, were entitled to their damages for the breach of contract. The Supreme Court of Wisconsin directed a new trial, very properly holding that there had been misdirection in the court below. We think the principle governing both of these cases (Smith *v.* Stoller, 26 Wis. 671, and Bacon *v.* Eccles, 43 Wis. 227) is that for which we have contended during our discussion of this subject, and which we have deduced from the latest English cases, and under which the holding in both of these Wisconsin cases can be sustained; viz., that whether the sale be by sample, or is of specific or distinguished goods, and goods have been delivered by the vendor and actually received by the vendee, and those goods conform to the sample, or are the specific or distinguished goods purchased (as in Cusack *v.* Robinson, 1 B. & S. 299), they, by the very act of purchase having been accepted, assented to, agreed upon *as* the subject of the sale, cannot be rejected; but if the goods delivered are not according to the sample, or are not the specific, distinguished goods which have been purchased (and by the very act of their being purchased been accepted, approved, agreed upon as the subject of the purchase), then there has been no acceptance of them, and, notwithstanding their actual receipt, they may be rejected as not being the subject of the purchase. In Knight *v.* Mann, 118 Mass. 143, 145, citing Cusack *v.* Robinson, 1 B. & S. 299; Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481, it is in effect admitted that the purchase of a specific, ascertained chattel, which the buyer inspected and examined at the time of the agreement, is an acceptance of the chattel to satisfy the acceptance of the statute. So in Townsend *v.* Hargraves, 118 Mass. 325, 331, it is said by the court, to show an acceptance within the statute: "The plaintiff relied on an oral contract of sale to the defendant of a quantity of wool in bales then in Boston, and held in store by one Williams. *The sale was by sample for a given price per pound, and the bales were specifically designated and appropriated by the terms of the contract.*" See Brewster *v.* Taylor, 63 N. Y. 587, where there was a purchase of a specific article, which, as in Cusack *v.* Robinson, 1 B. & S. 299, constituted an acceptance; but the court held that there was not an acceptance, meaning that there was not a receipt. See Smith *v.* Brennan, 62 Mich. 349; Somers *v.* McLaughlin, 57 Wis. 358; Gaslin *v.* Pinney, 24 Minn. 322; Taylor *v.* Mueller, 30 Minn. 343; Fontaine *v.* Bush, 40 Minn. 141. In Jones *v.* Mechanics' Bank, 29 Md. 287, 293, it is incorrectly said: "Whilst there can be no acceptance under the statute without delivery by the seller, yet there must be both delivery and acceptance in order to sustain an action upon the contract." Here the misuse of the term "acceptance," where "actual receipt" was meant, is very palpable. But in the later case in the same court of Hewes *v.* Jordan, 39 Md. 472, it is more correctly said by the court: "From the plain meaning of the terms of the statute itself, independent of all authority, the concurrence of two distinct acts on the part of the vendee would seem to be required. He must accept, and he must actually receive part of the goods, in order to render the contract binding on him. There may be an actual receipt without any acceptance, and there may be an acceptance without any receipt; but if both these acts concur, with the intention of the parties that the vendee shall take possession of the goods under the contract as owner, then the latter must be taken as having made a final election to accept the goods, or such part of them as he may actually have received, as his property, and at the same time *assent to their being such as will satisfy the contract*; (*a*) and acceptance and receipt being thus complete to bind the contract, the vendee cannot afterwards withdraw his acceptance and reject the goods, except it be on the ground of fraud." There is much otherwise in the judgment (see particularly at pp. 483, 484) which presents question as the exact equivalent of the *acceptance* of the statute.

(*a*) The italics are ours, and the language is precisely that which we have used throughout our discussion of the

views identical with those expressed by us in our investigation, and in condemnation of many of the badly-decided English cases on the subject. The case is a very valuable one, and is in effect the same as Cusack *v.* Robinson; is decided the same way, and is the most intelligently-decided case on the subject we have found reported in this country. Our view as to the correctness of our deduction from the latest English cases in sustaining our contention as to what is the acceptance of the statute, is strengthened by our examination of these American cases.

The case of Caulkins *v.* Hellman, 47 N. Y. 449, is not decided in accordance with our view as to the holding and correctness of the latest English cases. In Caulkins *v.* Hellman the sale was a verbal sale of goods by sample. There in the court below the judge directed the jury that, if the goods were actually delivered, in pursuance of the verbal contract to the purchaser's agents, in good order in merchantable condition, and corresponded in quality and in all substantial and material respects with the samples, the statute was satisfied. The jury found on these points in favor of the vendor in his action for the price of the goods. The Supreme Court of New York affirmed the judgment, on this finding of the jury. On appeal to the New York Court of Appeals the judgment was reversed and a new trial was ordered. The Court of Appeals in this case (see at p. 456) use the terms "accept or appropriate," "acceptance or appropriation," as though these were convertible terms. We think, as we have very fully shown, that as the term "accept" is used in the statute of frauds its meaning is very different from "appropriate," which word, although not the same, is nearer to the "actual receipt" of the statute than it is to the term "accept." Similar conflict to that manifested between the Supreme Court and the Court of Appeals of New York on the subject in Caulkins *v.* Hellman, 47 N. Y. 449, again appears in Stone *v.* Browning, 51 N. Y. 211; 68 N. Y. 598. This was another case of a verbal sale of goods by sample. After a receipt of the goods by the purchasers they refused to pay for them, and sent them back to the sellers. In an action for the price, the statute of frauds was relied on. The judge on the trial directed the jury, among other things, in effect, that if, after receipt and examination of the goods by the defendants, the goods corresponded with the samples, the statute was satisfied; but if, at the close of the examination, the goods proved to be inferior to the samples, the defendants had the right to return them. The verdict for the plaintiffs was affirmed by the Supreme Court and reversed by the Court of Appeals (51 N. Y. 211). On a second trial the Supreme Court again affirmed the judgment for the plaintiffs, which again was reversed by the Court of Appeals (68 N. Y. 598). These cases were decided prior to the latest English cases discussed by us in the text; and the old English cases, such as Phillips *v.* Bistolli, 2 B. & C. 511; Smith *v.* Surman, 9 B. & C. 561; Howe *v.* Palmer, 3 B. & Ald. 321; and Hanson *v.* Armitage, 5 B. & Ald. 557, containing such language as "actual acceptance," "part acceptance," etc., used in these cases rather in reference to the actual receipt than the acceptance of the statute, were relied on by the New York Court of Appeals to sustain their decisions. The mass of the American cases, as we have before intimated, will be found to follow those old English cases, where, as we have fully shown, there is such a complete failure to distinguish between the acceptance and the actual receipt of the statute. A consideration of the effect of the latest English decisions may lead to what is, we think, a more correct understanding of the meaning of the statute. For additional American cases on the subject, see Rodgers *v.* Phillips, 40 N. Y. 519; Johnson *v.* Cuttle, 105 Mass. 447; Snow *v.* Warner, 10 Met. 132; Marsh *v.* Hyde, 3 Gray, 331; Ullman *v.* Barnard, 7 Gray, 554; Ross *v.* Welch, 11 Gray, 235; Dole *v.* Stimpson, 21 Pick. 284; Remick *v.* Sandford, 120 Mass. 309; Atherton *v.* Newhall, 123 Mass. 141; Meehan *v.* Sharp, 151 Mass. 564; Audenreid *v.* Randall, 3 Cliff. 99, 113; Dows *v.* Greene, 24 N. Y. 638; Quintard *v.* Bacon, 99 Mass. 185; Borrowscale *v.* Bosworth, *Ib.* 378, 381; Gray *v.* Davis, 10 N. Y. 285; Marsh *v.* Rouce, 44 N. Y. 643; Allard *v.* Greasert, 61 N. Y. 1; Gilman *v.* Hill, 36 N. H. 311; Gault *v.* Brown, 48 N. H. 183; Pinkham *v.* Mattox, 53 N. H. 600; Grimes *v.* Van Vechten, 20 Mich. 410; Smith *v.* Brennan, 62 Mich. 349; Simpson *v.* Krumdick, 28 Minn. 352; Brownlee *v.* Bolton, 44 Mich. 218; Maxwell *v.* Brown, 39 Me. 98; Dyer *v.* Libby, 61 Me. 45. To these an almost indefinite number of cases might be added, which, like the mass of these, follow the old English cases, where the distinction which, as we have shown, really exists between the acceptance and the actual receipt of the statute has been ignored, and the terms "accept and actually receive" treated as meaning nothing more than "receive and actually receive"!

BOOK IV.

PART VII.

THE ACTUAL RECEIPT.

In considering, in the next preceding Part, the question of the acceptance under the Statute of Frauds, which, with the actual receipt of some part of the goods sold, is necessary to cause the contract to be "allowed to be good," we have seen that the term "and *actually* receive the same" had relation not to the particular kind of receipt, which, with the acceptance, was necessary to make the contract for the sale a binding one, but to the acceptance itself; the acceptance being one thing and the *actual receipt* quite another. This, notwithstanding the inextricable confusion on the subject existing in the English cases, and the repeated declarations of many of the very ablest of the English judges that there is essentially no difference or distinction between the acceptance and the actual receipt of the statute,[1] we think we have made perfectly clear.

We have seen that the term "accept" is there used, as it is in other cases, in the sense of assent, rather than that of receipt, and that the term actual receipt, in distinction from the accepting or assenting, could be any "actual," positive, absolute, unconditional receipt that the subject-matter admitted of, that would be good at common law, whether such receipt was manual, constructive, or symbolical. This, we think, in showing the distinctive meaning of the accepting of the statute, we have made clear beyond controversy.

The actual receipt consisted in Searle *v.* Keeves,[2] where there were goods in a warehouse, in the delivery of an order on the

[1] See Hopton *v.* McCarthy, 10 L. R. Ir. 266, 270: "In some of the cases receipt and acceptance seem to be considered the same." And *per* Cockburn, C. J., in Castle *v.* Sworder, 6 H. & N. 835: "The question for us is whether there was any evidence of an acceptance and receipt of the goods to satisfy the statute. I think that these terms are equivalent." In Hopton *v.* McCarthy, *supra*, goods ordered by the defendant had reached the railway station at the terminus of the route, and it was held that they were received by the defendant; but as they were promptly rejected by him, and acceptance of them refused, the court held that the case was within the statute, both acceptance and receipt being necessary, and that, in this case, though there was the actual receipt, there was not the acceptance.

[2] 2 Esp. 598.

warehouseman by the vendor to the vendee, and a delivery of the order by the vendee to the warehouseman, without any other actual taking possession of the goods by the vendee, and it was held by Eyre, C. J., that this was a sufficient actual receipt to satisfy the statute. And in Chaplin *v.* Rogers,[1] where the goods were ponderous, as a stack of hay, it was held that both within the Statute of Frauds, and in an action for goods sold and delivered, the jury might find an actual receipt of the hay by the vendee, without its having been actually handed over to him by the vendor, if it was the intention of both the parties, who were present at the stack of hay where the contract for the sale was made, that there should be an actual transmission of the possession.

In Hinde *v.* Whitehouse,[2] where a sale was made of specific goods, which, at common law, was good to pass the property, a delivery of a sample which was part of the bulk was held to satisfy the statute as regards the actual receipt required, and the sale itself having been an assent to the specific goods as the subject of the sale, the part delivery was held sufficient to make the purchaser liable for the goods purchased, even though they were destroyed by fire without having reached his actual possession.

But in Klinitz *v.* Surry,[3] where it was held that a delivery of a bulk sample was an actual receipt of part of the goods, yet where the bulk received did not correspond with the sample, the requirements of the statute were not met, there having been no acceptance of goods which were according to sample, and, therefore, no acceptance of the goods which were received, as they were not the goods which had been assented to or accepted.

And so, in Cooper *v.* Elston,[4] though there was a sale of specific goods by sample, which amounted to an acceptance of the specific goods which were sold by sample, the sale was within the statute, as there was but a delivery of a sample, which was not a delivery of any part of the goods sold.[5]

The case of Hodgson *v.* Le Bret[6] was one where it was held that where specific goods had been marked by the purchaser with her name, this was a sufficient actual receipt of the goods marked by her, if she intended thereby to appropriate them to her own use; but that this would not affect other goods ordered at the same time, which had not been produced to her, and which she had not appropriated. This case can only be sustained on the grounds that the purchase of the goods appropriated was an entire transaction,[7] so as not to make it a part receipt of the whole of the

[1] 1 East, 192.
[2] 7 East, 558.
[3] 5 Esp. 267.
[4] 7 T. R. 14.
[5] Gardner *v.* Grout, 2 C. B. N. S. 340, is to the same effect.
[6] 1 Camp. 233.
[7] See Price *v.* Lee, 1 B. & C. 156; Elliott

goods; and that, as to the goods marked, they were thereafter held by the vendor, divested of his lien, as the vendee's property. Thus, as in Anderson *v.* Scott,[1] where the plaintiff had selected several pipes of wine, and bought them at an agreed price, thus accepting and assenting to them as the very subject of the sale; the spills or pegs by which the wine is tested were then cut off; the plaintiff's initials were marked on the casks, in his presence, by the defendant's clerk, and the plaintiff took the gauge numbers of the casks. This was held to be a delivery, and hence a receipt, of the wine.[2]

Elmore *v.* Stone[3] is another case of constructive delivery at common law, which satisfies the actual receipt of the statute. In this case there was a clear bargain and sale of specific goods at common law, which, we think, where that form of action at common law can be sustained, is included in the acceptance of the statute. After the verbal bargain for the purchase of the subject of the sale, two horses, had been closed, it was arranged between the vendor and vendee that the vendor should keep the horses at livery for the purchaser. The latter was never in corporeal possession of the horses. In an action for the price of the horses, the court held that there had been a constructive delivery of the horses, which met the actual receipt required by the statute. The case was compared to others of symbolical or constructive delivery, where goods are in a warehouse, or at a wharf, and the key of the warehouse is delivered; or a note is given addressed to the wharfinger, who in consequence makes a new entry of the goods in the name of the vendee, although no transfer of the local situation or actual possession takes pl . But in the case of Blenkinsop *v.* Clayton,[4] where there was clear evidence of acceptance to satisfy the statute; the subject of the sale, a horse, was never manually or constructively out of the possession of the vendor, so as to make an actual receipt within the statute. But the court, while distinguishing the case from Chaplin *v.* Rogers,[5] as there was nothing more to be done in that case to confer a possession of the haystack, thought it a question that should be submitted to a jury, whether the defendant's attempting to sell the horse might

v. Thomas, 3 M. & W. 170; Scott *v.* The Eastern Counties Ry. Co., 12 M. & W. 33; Bigg *v.* Whisking, 14 C. B. 195; Baldey *v.* Parker, 2 B. & C. 37; Thompson *v.* Maceroni, 3 B. & C. 1; Rohde *v.* Thwaites, 6 B. & C. 388.

[1] 1 Camp. 235, n.

[2] The correctness of the decision in this case has been much questioned. See *per* Best, C. J., in Proctor *v.* Jones, 2 C. & P. 532, 534. But we think that if the intention of the parties to the sale (which would be a question for the jury), by the mutual acts of the vendor and vendee, was to pass the property to the vendee, so that the vendor would simply hold the wine, deprived of his lien, as the bailee for the vendor, then there would be a perfectly good constructive delivery and actual receipt. But then the action was misconceived, and should have been in trover for the wrongful retention of the wine instead of in assumpsit for its non-delivery.

[3] 1 Taunt. 458.

[4] 7 Taunt. 597.

[5] 1 East, 192.

not have amounted to an actual receipt to satisfy the statute. As however, it seems quite clear in this case that the vendor had not parted with his lien, as it was held he had done in Elmore *v.* Stone,[1] and as it is clear that the vendee could not have maintained trover against the vendor for the horse, as he clearly could have done in Elmore *v.* Stone, for the horses there, we think that, even had the jury found that there had been a delivery of the horse, their verdict could not have been sustained. Wood, B., was of that opinion, and the court (Gibbs, C. J., and Dallas, J.) were, evidently, very much of the same opinion.

In Howe *v.* Palmer,[2] as we have seen in the previous Part, the term "accept" is inextricably mixed with the "actual receipt" of the statute. The case, though, clearly holds, that, where a vendee had verbally agreed at a public market with the agent of the vendor to purchase twelve bushels of tares (then in vendor's possession, constituting part of a larger quantity in bulk), to remain in vendor's possession till called for, and the agent, on his return home, measured the twelve bushels, and set them apart for the vendor, this did not constitute a constructive receipt. The vendor here held the tares, not as bailee for the vendee, but as the unpaid vendor, with his lien attaching, and without the right on his part to maintain an action for goods sold and delivered, nor on the part of the vendee to maintain trover for the goods. The case was essentially different from Elmore *v.* Stone,[3] which was relied on. So, in Tempest *v.* Fitzgerald,[4] where there was a clear acceptance of the horse that was there purchased, but the sale was made for ready money, and the horse was left in the possession of the vendor unpaid for, it was held that there had been no actual receipt of the horse by the vendee; the horse remaining in the possession of the vendor with the lien for the payment still attaching; notwithstanding acts by the vendee which clearly showed an acceptance of the horse, but which did not show the ultimate possession of the horse to be in him.

On a sale of goods for cash at common law the vendor has a lien for the price so long as he retains possession as vendor, or owner, of the goods. The Statute of Frauds does not alter the law in this respect. The part payment of the goods purchased, or the note or memorandum in writing, gives the vendee no other or greater right in the goods than he would have had before the passage of the statute. Neither then does the acceptance by the vendee "of a part of the goods sold and the actual receipt of the same." This is, as is the part payment, or the memorandum in writing,

[1] 1 Taunt. 458.
[2] 3 B. & Ald. 321.
[3] 1 Taunt. 458.
[4] 3 B. & Ald. 680.

but the statutory evidence to prove the contract of sale. While the remainder of the goods remains in the possession of the vendor, where the sale is not on credit, with the possession is retained the lien, precisely as in the cases where the contract of sale is otherwise proved.

If, as in Elmore *v.* Stone,[1] there has been such a dealing, by both of the parties, with the goods, as amounts to a constructive delivery of all the goods (there having also been the acceptance of them by the vendee), so that, even though the possession remain with the vendor, but in the capacity of a bailee or custodian for the vendee, and not as vendor or owner, then the possession is really in the vendee, and, with the possession gone, the lien is gone. So, on principle, where there have been an acceptance by the vendee of the whole of the goods, and an actual receipt of them, it follows, that, the property and possession being both in him, not only is the lien and the right of *stoppage in transitu* gone, but the right, as well, of rejection of the whole or of any part of the goods. The contract then is absolutely and conclusively executed, outside of the question of fraud, and outside of any remedy he may have on any express or implied warranty in the contract. It follows, then, that for any unlawful taking or retention of the goods trover would lie by the vendee, as in any other case of the unlawful taking or detention of his goods, and the whole risk of loss of the goods and insurable interest would be in him. And, on the other hand, where there have been the acceptance and the actual receipt of the whole of the goods by the vendee, an action for the price will lie against him by the vendor, as for goods sold and delivered.

But while this is the plain logical outcome of the statute, there are cases, where, while there has been a clear acceptance of the goods as the subject of the purchase and sale, there has been no actual receipt or actual delivery of the goods, either in the sense of a manual, symbolical, or constructive delivery or receipt. Yet, notwithstanding this, in such cases, in utter violation of the statute, it has been held, that the declarations of the vendee, to which the vendor was no party, constituted an actual receipt by the vendee of goods which had never passed out of the possession of the vendor; on which he had never relinquished his lien for the price, and for which, as against him, clearly, the vendee could not maintain trover.

Such cases are represented by the *nisi prius* case of Baines *v.* Jevons,[2] where there was a verbal sale of a fire-engine for £25, but not a tittle of evidence to show the transmission of the possession of the engine from the vendor to the vendee. The evidence

[1] 1 Taunt. 458.

[2] 7 C. & P. 288.

clearly shows that there was an acceptance of it, but no manual, symbolical, or constructive transfer of the possession, which remained with the vendor with his lien attaching to the engine. The question really, as to the actual receipt, was not named in the case, except in the pleadings, Alderson, B., merely leaving the question to the jury whether the acts and declarations of the vendee showed that he had "accepted" the fire-engine. Unquestionably he had accepted it, within the meaning of the statute, but there was no evidence whatever that he had ever received, or, correlatively, that the vendor had delivered it.

An important distinction is suggested by the badly decided case, on the question of actual receipt, of Baines *v.* Jevons,[1] thus: The acceptance, which is an act of the mind on the part of the vendee, and on his part alone, and which may be express or implied, may be unquestionably implied by any of his acts or declarations which manifest his acceptance of the very subject of the sale. An actual receipt, on the contrary, like the part payment of the statute, cannot be the act of one alone of the parties to the contract. As the part payment of the purchase-money must be the mutual act of both parties, the vendee to pay, the vendor to receive the payment; so the actual receipt of the statute requires the joint action of both vendor and vendee, the vendor to deliver and the vendee to receive delivery of the goods purchased or of some part thereof. This, as a fair deduction from the cases themselves, and from the manner in which they are treated by all the text-writers, is an infallible test in all the cases that are represented by Baines *v.* Jevons;[2] Anderson *v.* Scott;[3] Elmore *v.* Stone;[4] Chaplain *v.* Rogers;[5] Tempest *v.* Fitzgerald,[6] and kindred cases.

Unless, as such deduction from those cases (where there is also the statutory acceptance of the whole of the goods), there has been an actual transmission of the possession — manual, constructive, or symbolical — to which both vendor and vendee have been parties, so that as against one an action of trover will lie for the wrongful withholding of the property, — the ownership, right of possession, and lien of the vendor being gone; and an action for the price as for goods sold and delivered lying against the other; the risk of loss, and the whole insurable interest being in him, — then the statute is not satisfied, and there has not been the actual receipt which is required.[7]

[1] 7 C. & P. 288.
[2] *Ibid.*
[3] 1 Camp. 235, n.
[4] 1 Taunt. 458.
[5] 1 East, 192.
[6] 3 B. & Ald. 680.
[7] This is entirely aside from the consideration of the doctrine of estoppel as applicable to this class of cases; a doctrine neither relied on in these cases, nor adverted to by any of the courts or text-writers by whom they have been cited or discussed, either in England or in this country. We will consider this impor-

There is one apparent, but not real exception, to this rule. Where goods which have been accepted have been placed by the vendor in the possession of a carrier, and the vendor has assigned the bill of lading to the vendee; the vendee, notwithstanding the continuance of the vendor's lien in the right of *stoppage in transitu*, may sell the goods, assign the bill of lading, and pass the property in the goods to a third party. But this is simply because, by the assignment of the bill of lading, the vendor enables the vendee, on the one hand, to extinguish the lien, amounting to a constructive taking possession of the goods by the vendee's assignee, with, in effect, the assent of the vendor; and, on the other hand, also by the act of the vendor, enabling the vendee, by virtue of the assignment of the bill of lading, himself to take actual possession of the goods at the terminus of the *transitus*. So that this case, too, is quite within the rule.

The case of Parker *v.* Palmer [1] was one where there was a dealing with the goods, after a sale by sample, the bulk not corresponding with the sample. Although the acts of the vendee amounted to an implied acceptance of the goods, the lien for the payment still continuing to attach, there was no actual receipt by him. As, however, there was a sufficient memorandum in writing of the contract, an action for the price was sustained. The action, however, was for goods bargained and sold, and not for goods sold and delivered.

In Hanson *v.* Armitage [2] the question reserved at the trial was whether "the delivery of the goods, and the acceptance [? receipt] of them by the wharfinger, *for the purpose of transmitting them* by the usual conveyance, was to be deemed an acceptance of them by the buyer." This, as we have seen,[3] is usually relied on to show that the carrier is the agent of the vendee to receive, but not to accept. The case really shows nothing of the kind. The term "acceptance" is used in an uncertain way; but all the case really holds is that the delivery to the warehouseman did not constitute the acceptance and actual receipt of the vendee. Whether the receipt by a carrier or warehouseman is the actual receipt — not the acceptance — of the vendee depends upon whether such warehouseman or carrier is so far the servant or agent of the vendee, that his receipt is the ultimate receipt of the vendee, terminating the *transitus* of the goods as between the vendor and vendee. If, as the case, aside from the unreliable use by the court of the term "accept," (using it, as they do, in a double sense), would seem to imply, the wharfinger was simply to transmit the goods to

tant point, in our discussion of "estoppel," in a later volume of this work.

[1] 4 B. & Ald. 387.

[2] 5 B. & Ald. 557.

[3] *Supra*, p. 331, n. 3.

their ultimate destination, so that the *stoppage in transitu* would continue until they reached the possession of the purchaser, then the delivery to the forwarder would not be an actual receipt, much less an acceptance by the vendee.

Although it is stated in Carter *v.* Toussaint[1] that "there was no acceptance of the horse," which was the subject of the sale, within the exception to the seventeenth section of the statute, the "acceptance" was undoubted. As however, the horse, after the sale, continued in the vendors' possession, with the lien attached, so that, as Abbott, C. J., said, "the plaintiffs' character continued unchanged from first to last," there was no actual receipt by the vendee of the horse. This, evidently, notwithstanding the misuse by Abbott, C. J., of the term "acceptance," is all he means when he says, "There was then no sufficient acceptance [receipt] to take the case out of the Statute of Frauds." So, Bayley, J., was really but dealing with the question of the actual receipt, when he said, "There can be no acceptance or actual receipt, by the buyer, unless there be a change of possession; and unless the seller devests himself of the possession of the goods, though but for a moment, the property remains in him." This is entirely accurate, as shown by the general trend of the cases, as to the actual receipt. It is grossly inaccurate as to the acceptance. The whole question involved in the case was whether there had been an actual receipt by the vendee of the specific horse which he had bought (so thereby assenting to and "accepting" the horse as the very subject of the sale), and it was correctly held that, as the vendors had never, even for a moment, parted with their possession of the horse, nor detached their lien on it for the price, the vendee had never been in the actual receipt of it.

Where there has been an actual receipt of goods, but there has been only an acceptance of some part of them, — the transaction not being entire, — there, notwithstanding the actual receipt of the whole, the unaccepted part of the goods may be rejected.[2] As, also, where there is an actual receipt of the whole of them, but no acceptance of any of them, the whole can be returned.[3] And when there has been an acceptance of the whole of the goods, as there must be also their actual receipt, or the receipt of some part of them, the vendee, in the absence of the receipt of a part, may refuse to receive the whole of them.[4]

[1] 5 B. & Ald. 855.

[2] Price *v.* Lea, 1 B. & C. 156. And see Hodgson *v.* Le Bret, 1 Camp. 233; Elliott *v.* Thomas, 3 M. & W. 170; Scott *v.* The Eastern Counties Ry. Co., 12 M. & W. 33; Bigg *v.* Whisking, 14 C. B. 195.

[3] Kent *v.* Huskinson, 2 B. & P. 233.

[4] Baldey *v.* Parker, 2 B. & C. 37. "Acceptance" in this case is, as is so usual in the English cases, improperly used where but the actual receipt of the statute is intended. In this case the specific goods were selected and accepted by the vendee, as in Cusack *v.* Robinson, 1 B. & S. 299,

In Phillips *v.* Bistolli,[1] the effect of the finding of the jury was that there had been an acceptance of the goods sold, which was in effect, as well as in terms, the only question which seems to have been submitted to them. Specific goods were sold at auction, and on their being knocked down to the defendant, were handed to him. A few minutes after, he claimed that he had been mistaken in the price. The jury found that he had not mistaken the price; therefore that the minds of the parties were *ad idem*, and that the vendee had "accepted" the goods. A rule *nisi* for a new trial was granted on the ground "that there was no acceptance [receipt], inasmuch as the plaintiff had a lien upon the goods until the price was paid, and he could not therefore have intended to *part with the possession* of the goods." The court, in making the rule absolute, held, that it was a question for the jury, whether, under the facts, there had been such a parting with the possession by the vendor, and receipt by the vendee, as owner, as destroyed the vendor's lien; and, therefore, in effect, whether, in addition to the acceptance of the goods as the subject of the sale under the particular contract, as the jury had found, there was also the actual receipt required by the statute.[2]

but they were not delivered to him, and he refused to receive them. Abbott, C. J., said: "The words of the exception are peculiar, 'except the buyer shall accept part of the goods so sold, and actually receive the same.' It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer. If we held that such a transfer and acceptance [receipt] were complete in this case, it would seem to follow as a necessary consequence that the vendee might maintain trover without paying for the goods, and leave the vendor to this action for the price." And Holroyd, J.: "Upon a sale of specific goods for a specific price [exactly what constitutes an acceptance or assent to the goods as the subject of the sale under the contract], by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and, therefore, as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute." All that is meant by this, notwithstanding the peculiar language used, is that where there has been an acceptance of specific goods for an agreed price, so that, but for the statute, the property, subject to the vendor's lien for the price, would be in the vendee, there must also, to satisfy the requirements of the statute, be a transmission of the possession in some part, or the whole of the goods, to the vendee, so that, where the transmission is of the possession of the whole of the goods, the vendor's lien is gone.

[1] 2 B. & C. 511.

[2] The case of Phillips *v.* Bistolli, 2 B. & C. 511, shows the inextricable confusion of the English judges on the questions of the acceptance and the actual receipt of the statute. The term "acceptance" all through the judgment is simply used as though it meant actual receipt, or as though the statute had but the one word "accept," or the one word "receive," and did not contain the words accept *and* actually receive. The language of the judgment is: "In order to satisfy the statute there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner. It lies upon the plaintiff in this case to make out that there was such delivery and acceptance. Now, here by the printed conditions of sale a deposit of thirty *per* cent. was to be paid upon the party being declared the highest bidder, and the residue of the purchase-money when the goods were removed; and it is not to be presumed that the vendor intended, contrary to that condition, to part with the right of possession until

So, in Bentall *v.* Brown,[1] where there was a verbal sale of specific goods, at £13 14*s.*, which were at the London docks, and for which a delivery order was sent to the vendee, the real holding in the case is (although as usual the term "acceptance" instead of "receipt" is used), that there could be no actual receipt of the goods until the dock company "*accepted*[2] the order for delivery, and *thereby assented* to hold the goods as the agent of the vendee."[3] And in Nicholle *v.* Plume,[4] where specific goods were bought by

the deposit or price was paid. There was, therefore, very slight evidence to show that the plaintiff intended to part with all control over the goods when he delivered them. Then was there any acceptance by the defendant as owner? It appears that a very short interval elapsed after the lot was knocked down before the defendant objected that he had been mistaken in the price. Unless, therefore, the retaining of them for the three or four minutes that intervened was evidence of an actual acceptance by him as owner, it is clear that there was not any acceptance afterwards. That, at all events, was very slight evidence of an acceptance by the defendant as owner; and it ought, at least, under all the circumstances, to be submitted as a question of fact to the jury, whether there was a delivery by the vendor and an actual acceptance by the vendee, intended by both parties to have the effect of transferring the right of possession from the one to the other." If throughout this the word "receipt" be substituted for the word "acceptance," it will, on the facts in the case, be found an accurate statement of the law.

There were an acceptance and an actual receipt of part of the goods in Thompson *v.* Maceroni, 3 B. & C. 1, which was an action for goods sold and delivered. As the mass of the goods, however, remained in the vendor's possession, the court held that the plaintiff could not recover on the count for goods sold and delivered. The court also say "that there was no actual acceptance [receipt] of these goods by the buyer within the 17th section of the statute of frauds." What they seem to mean, and which would be perfectly correct, is, that there having been no actual receipt of the goods, a count for goods sold and delivered would not lie. In the case as reported in 4 D. & Ry. 619, Bayley, J., says: "With respect to the statute of frauds, it is plain that there was no delivery and acceptance [receipt] here within the meaning of the 17th section, for the vendee got possession of a very small part only, and was not permitted, nor had any right, to take the rest until he paid or gave security for the value of the whole." This would be quite a good reason why an action for goods sold and delivered would not lie, but it would be no reason why, where there were both the acceptance and the actual receipt of part of the goods, it would not effectually take the case out of the statute, even though the vendor's lien for the price continued to attach to the undelivered residue. The acceptance and part receipt would as effectually take the case out of the statute as a memorandum in writing or a part payment would do; but in neither of these cases would a count for goods sold and delivered lie. It is, as we fully pointed out in the last preceding Part, where it is claimed that there have been an acceptance and actual receipt of the whole of the goods, that the tests as to the continuance of the lien (where the sale is not on credit), and the relative rights of maintaining goods sold and delivered and trover, show whether or not the case has been taken out of the statute. In Elliott *v.* Thomas, 3 M. & W. 170, 177, Parke, B., although himself there improperly using "accepting" as synonymous with "receipt," points out that the decision in Thompson *v.* Maceroni, 3 B. & C. 1; 4 D. & Ry. 619, turned entirely on the form of action. Had the count there been for goods bargained and sold it would have been sustained, as it would if the case had been taken out of the statute by a part payment.

[1] 3 B. & C. 423.

[2] Here is another instance where the term "accept" is not used in the sense of receive, but in that of assent.

[3] The court said: "They held it originally as the agents of the vendors; and as long as they continued so to hold it the property was unchanged. It has been said that the London Dock Company were bound by law, when required, to hold the goods on account of the vendee. That may be true, and they might render themselves liable to an action for refusing so to do; but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not be any actual acceptance [receipt!] of them by him until he actually took possession of them." The word acceptance being changed to receipt, this is clear law.

[4] 1 C. & P. 272.

verbal contract, for above £10 in value, and were sent to the purchaser, who refused to receive them, but caused them to be lodged in a warehouse near his premises, but not belonging to him, and neither returning the goods to the seller, nor notifying him of his refusal to receive the goods, the court held that the statute was not satisfied, as the actual receipt must be unequivocal. As usual, they employ the term "acceptance," but obviously mean receipt.

Again, in Proctor *v.* Jones,[1] there was the acceptance required by the statute. In this case, as is rare, it was correctly contended that there had been no actual receipt of the goods. In this case the accepted and assented-to goods, as the subject of the contract, were marked with the initials of the purchaser, and the facts as to acceptance were not dissimilar from those in the later and important case on the subject, of Cusack *v.* Robinson.[2] The court held that there had been no actual receipt to take the case out of the statute.[3]

In Smith *v.* Surman[4] there was no actual transfer of the possession of the goods, manual, constructive, or symbolical, to the vendee. His offer to resell a portion of the goods was relied on to take the case out of the statute; but however much his acts or declarations may tend to show that he has, as an act of the mind, accepted the goods, when, as in Smith *v.* Surman, the evidence shows that there has been no receipt by the vendee of any part of the goods, but that the vendor's lien attaches to the whole of them, his acts or declarations will no more constitute an actual receipt under the statute, to supply the evidence required by the statute, than they will to show that there has been a note or mem-

[1] 2 C. & P. 532.

[2] 1 B. & S. 299.

[3] In this case, Best, C. J., although starting to discuss the question as to whether the vendee had "actually received" the goods (italicizing the *actually received*), falls into the usual error of employing acceptance as a synonym for the actual receipt of the statute. He says: "It cannot be said in the present case, that the defendant *actually received* the goods. Could the vendee maintain trover if the goods were not delivered? Certainly, he could not, for the seller would have a lien on them for the price, as there was no stipulation as to payment at a future time. But not only was there no delivery, but there was no complete contract at the time of the making; for at that time the time of payment was not agreed upon; but it was settled in a conversation afterwards. If there was no complete contract at the time of the making, then the marking cannot be an acceptance [receipt] under the statute. If the plaintiff had made a transfer in the dock-books, that would, in my opinion, have been a symbolical delivery." It will be noticed here that Best, C. J., states that there was no stipulation as to payment at a future time; still he shows, almost in the next sentence, that there was. But his more serious mistake is, where he says, as he does, that "it is the intention of the statute that there should be as complete a delivery as *can be* according to the nature of the article." And yet he shows that a symbolical delivery here was good of articles which, according to their nature, were susceptible of a manual delivery. And numerous well-decided cases show that the constructive receipt is sufficient, under the statute, of such subjects as horses, carriages, pipes of wine, etc., which are capable of a manual delivery, or a literal, corporeal transmission of possession.

[4] 9 B. & C. 561, fully examined by us, *supra*, 338 *et seq.*

orandum of the contract in writing, or of the payment of earnest or a part payment, when, in fact, there has been no such memorandum and no such part payment.[1]

Maberley *v.* Sheppard,[2] which we have fully examined *ante*, 340, stripped of its errors, in mistaking the fact that there was "no proof of actual delivery," as showing that, therefore, there was no "acceptance under the Statute of Frauds," really holds that neither an action for goods sold and delivered will lie, nor will a verbal contract for goods over the value of £10 be taken out of the statute, where the vendor continues to hold the goods with his lien attaching, even though some of the vendee's materials may be used in the making of the goods; there having been no delivery of the goods by the vendor, with an intention of vesting the possession in the vendee; and no actual receipt by the vendee, with an intention of taking possession as owner.

There was, apparently, an actual receipt of the goods in Acebal *v.* Levy,[3] by the vendee, as the goods seem to have been delivered to the vendee's own ship, at the foreign port, so that it would seem, in this case, that even the *stoppage in transitu* was gone, although the case is not altogether clear on this point; but, assuming that it was so, before the arrival of the goods at the home port, and while, it was held, the vendee was not precluded from objecting to the quality of the goods, he refused to accept them. So, even though the receipt was good, the want of the acceptance of the goods still left the exception of the statute unsatisfied. The action, too, was for not "accepting" (used here in the sense of refusing to receive) the goods; whereas had the statute been satis-

[1] The court make a very serious error in Smith *v.* Surman, 9 B. & C. 561, 576. They say: "The only question is, whether there has been a part acceptance of the goods sold, and actual receipt of the same." In the older cases the court did not advert to the words of the statute. But the later cases, (Howe *v.* Palmer, 3 B. & Ald. 321; Hanson *v.* Armitage, 5 B. & Ald. 559; Carter *v.* Toussaint, 5 B. & Ald. 855; Tempest *v.* Fitzgerald, 3 B. & Ald. 680), have established that unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, *there cannot be any part acceptance* [receipt]. Here there was nothing to show that the vendor had lost his lien for the price, or that the purchaser had lost his right to object to the quality. As we have pointed out in our previous Part, there may be a part acceptance and receipt, to satisfy the statute, and yet the vendor's lien may continue on the undelivered residue, and the purchaser have the right to object to the quantity and quality of the unaccepted and unreceived residue, just as the lien on the whole of the goods, and the right to object to them still exist, though the contract be taken out of the statute by a note or memorandum in writing, or by the part payment or earnest of the section. The rule stated applies to the case where it is claimed that the whole of the goods have been accepted and actually received, and where the test then, on the one hand, would be whether the lien (where the goods have not been sold on credit) and the right of *stoppage in transitu* were extinguished, and an action for goods sold and delivered would lie; and, on the other hand, whether the purchaser could maintain trover for the goods, as for their wrongful withholding by the vendor or another.

[2] 10 Bing. 99.

[3] *Ib.* 376.

fied,—the very form of action being a virtual admission that it was not,—the action should have been for goods sold and delivered.

The case of Elliott *v.* Pybus [1] was one where the sale was taken out of the statute by a part payment, and where the action was for goods bargained and sold. While there was clearly such an acceptance of the goods by the vendee, and acts by the vendor, as to amount to an appropriation of the specific goods, so that the property therein had passed to the vendee, under which a count for goods bargained and sold could be maintained, the case was treated as coming within the principle of the cases under the Statute of Frauds as to acceptance and actual receipt. But we think it is quite clear that while in the case there was an acceptance of the subject of the sale, so that at common law an action for goods bargained and sold would lie; as the vendor's lien still attached to the goods, and there was no delivery by the vendor, nor actual receipt — manual, constructive, or symbolical — by the vendee, an action for goods sold and delivered could not have been maintained, nor would the case have been without the statute except for the part payment. The sale was, exactly as the case holds, a perfectly good bargain and sale at common law, *dehors* the statute.

We have previously referred, in this and in the next preceding Parts, to the badly decided case, by Alderson, B., of Baines *v.* Jevons,[2] where the declarations of the vendee, which were sufficient to show an acceptance of the subject of the sale, were held to take the case out of the statute; the actual receipt required by the statute — of which receipt there was not a tittle of evidence — being entirely ignored, as is usual in so many of the loosely decided English cases on this subject. We would again suggest, as a rule to meet such badly decided cases as Baines *v.* Jevons, and those others which rely upon statements made by the vendee, which are material to show an acceptance of the subject of the sale, but do not touch the question of the actual receipt at all, that where evidence of the actual receipt is wanting, such statements, in the absence of such evidence, are of no more value to make out an actual receipt which has never taken place than they are, in the analogous case under the statute, to make out a part payment when no such part payment has ever been made.[3]

[1] 10 Bing. 512.

[2] 7 C. & P. 288.

[3] As we have before pointed out in this connection, there can be no part payment by the vendee unless there is a corresponding receipt by the vendor; so there can be no actual receipt by the vendee without an equally actual delivery by the vendor. Of such a delivery by the vendor there was not a tittle of evidence in Baines *v.* Jevons, (7 C. & P. 288), the vendor, as far as appears in the case, being himself the holder of the subject of the sale, with his lien attached, and there is nothing whatever in the case to show that the vendee could have maintained trover

The cases of Goodall *v.* Skelton[1] and Boulter *v.* Arnott,[2] stated *ante*, 343, n. 5, both of which were actions for goods sold and delivered, are instances where the acts of the vendees constituted the "acceptance" but not the "actual receipt" of the statute. The court, in the latter case, intimated that there could be an "acceptance" — treating it as though there was not an actual receipt also required — under the Statute of Frauds which would not be sufficient to sustain an action for goods sold and delivered. There may be, as we have shown, an acceptance and an actual receipt of *part* of the goods sufficient to satisfy the statute, where an action for the undelivered part will not lie for goods sold and delivered; but where, as in Boulter *v.* Arnott, the claim is that the whole of the goods have been delivered, and there have been no acceptance and actual receipt of a *part*, the requirements of the statute as to an actual receipt are no more met than the facts are sufficient to sustain an action for goods sold and delivered. The mistake in the matter, in all these English cases, arises from the extraordinary manner in which they have persisted in ignoring the "actual receipt" of the statute.[3]

In Johnson *v.* Dodgson[4] there was a purchase by sample, and the jury found that the bulk-samples corresponded with the samples by which the purchase was made. The bulk-samples were sent by coach to the defendant, who refused to receive them. The coach, in this case, seems to have been treated as the agent of the vendee to receive the bulk-samples;[5] but the case on the point is not of much value, and it is really decided on another point, — that of a memorandum in writing of the contract.

It was held in Elliott *v.* Thomas,[6] where the contract was entire, but the goods consisted of articles of different descriptions,

against him for the subject of the sale. We are surprised to find that neither Benjamin (although he cites the case) nor any other of the English jurists shows the unsoundness of Baines *v.* Jevons, except Campbell, who points out, as we have done before, referring to that writer, that, in it there was "no evidence whatever of actual receipt." Camp. on Sales, 180. As intimated by us (see *supra*, p. 442, n. 1), we will consider, in a later volume of this work, the effect of the application of the doctrine of estoppel in such cases.

[1] 2 H. Bl. 316.

[2] 1 Cr. & M. 333.

[3] On the argument in this case, Lord Lyndhurst, C. B., and Bailey and Vaughan, BB., treated such cases as Hodgson *v.* Le Bret, 1 Camp. 233, and Anderson *v.* Scott, 1 Camp. 234, *n.*, as holding that, in those cases, there was "*not a delivery, but an acceptance*, to take the case out of the statute of frauds." But they do not stop to explain, as the statute requires both an acceptance *and* an actual receipt, how, in these cases, the sales could have been taken out of the statute, where there was only an acceptance, and "not a delivery" or its correlative, an actual receipt. Until we entered on this investigation, we did not think it possible that there could be as many badly-decided cases, and utterly vicious *dicta*, among the English decisions, on any subject, as we find there are, down even to the present time, in connection with this branch of the statute of frauds.

[4] 2 M. & W. 653.

[5] See, as to the receipt by a carrier, Vale *v.* Bayle, Cowp. 294; Anderson *v.* Hodgson, 5 Price, 630; Hart *v.* Sattley, 3 Camp. 528; Astley *v.* Emery, 4 M. & S. 262; Dawes *v.* Peck, 8 T. R. 330; Dutton *v.* Solomonson, 3 B. & P. 582.

[6] 3 M. & W. 170.

that the receipt *and acceptance* of one of the articles was sufficient, where there was a receipt of the whole of the articles furnished according to the contract, and such as ought to have been delivered pursuant to it, to take the case out of the contract with respect to the whole of the goods. The question in such cases is as to the entirety of the contract. And in Jordan *v.* Norton,[1] where there was a receipt of the subject of the sale, but no acceptance of it as within the terms of the contract, it was held that the statute was not satisfied. In this case the parties were not *ad idem* as to the subject of the sale.

Wright *v.* Percival[2] was a case where there was an acceptance of the subject of the sale, — a carriage. It was held that there was an actual receipt of it, as the vendor was simply holding it as the bailee or custodian of the vendee. Although stated otherwise in this case, there is no case where there have been an acceptance and actual receipt by the vendee *of the whole of the goods* so as to take the case out of the statute, — where there is no receipt of a part to be relied on, — but that the lien[3] and the

[1] 4 M. & W. 155.

[2] 8 L. J. N. S. Q. B. 258, stated and fully considered, *ante*, 345 *et seq.*

[3] See further as to the extinction of the vendor's lien by the possession passing to the vendee, Goodall *v.* Skelton, 2 H. Bl. 316; Carter *v.* Toussaint, 5 B. & Ald. 855; Baldey *v.* Parker, 2 B. & C. 37, 40, 44; Rohde *v.* Thwaites, 6 B. & Cr. 388; Smith *v.* Surman, 9 B. & C. 561, 577; Proctor *v.* Jones, 2 C. & P. 532; Maberley *v.* Sheppard, 10 Bing. 99, 101; Elmore *v.* Stone, 1 Taunt. 458, 460; Holmes *v.* Hoskins, 9 Ex. 753, 755 *et seq.*; Bill *v.* Bament, 9 M. & W. 36; Edan *v.* Dudfield, 5 Jur. 316; Bushel *v.* Wheeler, 8 Jur. 532; Pettit *v.* Mitchell, 4 M. & G. 819; Marvin *v.* Wallis, 6 E. & B. 726; Castle *v.* Sworder, 5 H. & N. 281; 6 H. & N. 828; Morton *v.* Tibbett, 15 Q. B. 428, 438; Marshall *v.* Green, 1 C. P. Div. 35; 1 Bouv. Law Dict. (A. D. 1883), p. 90, tit. "Lien."

"Upon a sale of specific goods for a specific price, by parting with the possession, the seller parts with his lien. The statute contemplates such a parting with the possession, and, therefore, as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute." *Per* Holroyd, J., in Baldey *v.* Parker, 2 B. & C. 37, 44. In Beaumont *v.* Brengeri, 5 C. B. 301, 306, 308, it seems to be implied from the statement of counsel and the remarks of Maule, J., that they were of the opinion that there could be an acceptance and actual receipt of the whole of the goods purchased, and yet the vendor's lien for the price remain intact. But the case really holds that there was the sale of a specific article, which itself, at common law, making a sale, constitutes an acceptance of it as the subject of the sale within the meaning of the statute; and that the dealing with the subject of the sale by the vendee, with the consent of the vendor, constituted an actual receipt of it, even though it was subsequently returned to the custody of the vendor, who held it thereafter, not as owner, but as the agent or bailee of the vendee. And, of course, holding it not as owner, but as agent or bailee of the vendee, the lien as owner was gone, as was held in Elmore *v.* Stone, 1 Taunt. 458.

Dodsley *v.* Varley, 12 A. & E. 632, is a peculiar case. There wools had been purchased and accepted. They were bought for the defendant by his agent, for a specific price, but were not weighed. They were taken by the agent to the warehouse of a third person, where the agent collected the wools which he purchased for the defendant from various persons, and to which place the defendant sent sheeting for the packing of the wools, and they were there weighed and packed, but were not paid for. It was the custom for the wools to remain at this place until paid for. It was claimed here for the defendant that, under the custom, the plaintiff had never lost his lien, and consequently that there could have been no actual receipt by him to satisfy the statute. The court held that the receipt was sufficient to satisfy the statute, the property and

stoppage in transitu of the vendor are gone, and the right of the vendee to *reject* the goods is also at an end. The contract is then deemed to be good, and the property and possession in the whole of the goods are then in the vendor. This, as we have pointed out, does not apply where but part of the goods has been received. Neither does it affect the remedies of the vendee, as they existed at common law independent of the statute, for breach of warranty, express or implied, where there, as under the statute, the property and possession had both passed to the vendee.[1]

The holding in Harris *v.* Matthews[2] may be made intelligible,—the goods there having been delivered to the servants at an inn where the defendant was in the habit of stopping and of receiving goods — on the ground that he had made the inn his warehouse, and that, from the undue detention of the goods there, without rejecting them, after their actual receipt, an acceptance would be implied. This is a very different principle from implying an actual receipt where there had been no receipt. The acceptance, which is an act of the mind, may be implied from *laches* by the vendee, after receipt.[3] A receipt, which is an actual transmis-

possession in and of the goods being in the defendant, although the plaintiff had not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes but improperly called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property and the possession being in the defendant. This the plaintiff retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment; such special interest being consistent with the property and possession having both passed to the buyer. The special interest here would be more in the nature of a mortgage than a lien; and even then only of effect, if at all, while in the ownership of the vendee. As the possession was out of the vendor, the special interest could not be enforced as a lien could be, as that is enforced only by virtue of the possession. The custom would amount to no more than an express agreement by the vendee not to remove the goods until they were paid for; the breach of the agreement giving no remedy *in rem*. Thus, in Pettitt *v.* Mitchell, 4 M. & G. 819, 841, Maule, J., says: "According to the ordinary understanding of the English language, as soon as an article is put into the hands of a party, that is a delivery to him; the lien of the vendor is then parted with, and the vendee is in possession. If the lien still continued, how could it be enforced? It must be either by forcibly taking the article from the vendee, or by imprisoning him with the article in his possession; either of which would be a very inconvenient course."

[1] Where there are an acceptance and actual receipt of the whole of the goods, though it be subsequently found that there is a deficiency in the goods in quantity or quality, there being no fraud, the vendee cannot reject the goods, but is left to his action. See Pettit *v.* Mitchell, 4 M. & G. 819, 833. But the same rule does not apply where the sale is by sample, or where there have been an acceptance and receipt of only part of the goods. There, after receipt of the residue, if they are not the goods which are purchased, or do not conform to the sample, they can be rejected. *Ib.*, p. 836. And see Howe *v.* Palmer, 3 B. & Ald. 321; Lorymer *v.* Smith, 1 B. & C. 1; Chapman *v.* Morton, 11 M. & W. 534; Street *v.* Blay, 2 B. & Ad. 456; Hornecastle *v.* Farren, 3 B. & Ald. 497; Campbell *v.* Fleming, 1 A. & E. 40; Hunt *v.* Silk, 5 East, 449, and cases stated *infra*.

[2] 3 Jur. 1192.

[3] In Richardson *v.* Dunn, 2 Q. B. 645, the defendant, by letter, requested that plaintiff, a coal merchant at Stockton, would send to him at Southampton, as early and as low as possible, from 200 to 300 tons of coal, either by The Navigator or other vessel. Plaintiff, by letter, consented. The Navigator could not be obtained, and would not have carried 200 tons. Plaintiff, on December 31, shipped 152 tons for Southampton by another vessel; and, by letter of the same date, in-

sion of possession, and which involves the acts of both the vendor and vendee, cannot be implied, notwithstanding an acceptance, where there has been no actual transmission of the possession, manual, constructive, or symbolical, from the vendor to the vendee. Whether the receipt be of a part or the whole of the goods, the legal possession thereof must pass to the vendee, or there is no receipt by him.[1]

Goods were bought, at a stipulated price, payable on delivery. On their arrival at the vendor's warehouse, the vendee went there and directed the mark on the goods to be changed. This was done, but the goods remained in the possession of the vendor, with his lien attached. It was held that the statute had not been complied with, there having been no actual receipt.[2]

Where goods are in the possession of a party who buys them from the owner, evidence of the sale of the goods by the vendor to the vendee, and of a subsequent dealing with the goods by the latter, as owner, is sufficient to sustain the finding of the jury that there has been a transfer of the property and possession in and of the goods by the vendor to the vendee to satisfy the statute.[3] And where the goods have been actually received by the vendee, but he claims they are not the goods which he purchased, if he treat them as his own by selling them, the case will be taken out of the statute.[4] But where he has not, in fact, received any part of the goods, as where the right of *stoppage in transitu* continues; there, as the possession is not in him, there has been no actual receipt by him to satisfy the statute; and where there is no actual receipt, manual, constructive, or symbolical, as, for instance, where the goods remain for a lengthy period in the warehouse of the vendor's carrier, without being actually received by the

formed defendant that he had done so, stating also that he had drawn at two months for the price, payable in London. He also inclosed an invoice, and asked if he should engage another ship to make up the quantity. Defendant returned no answer. On January 6 the ship, with the coals, was lost. Plaintiff, according to the notice in his letter, drew a bill on defendant, which was paid into a banker's at Stockton on January 4, reached Southampton a few days later, and was presented to defendant for acceptance. The defendant, having heard the ship was lost, refused to accept the bill. In an action for goods sold and delivered, the court held that the defendant, by his silence, had acquiesced in the course of the plaintiff, and that, having waived objection to the plaintiff's departure from strict compliance with the order, he was in the same condition as if the order had been precisely executed, and was liable.

[1] It is upon this principle, as we have shown, that where the whole of the goods have been accepted and actually received so as to satisfy the statute, as there is no longer any possession in the vendee of any of the goods there is nothing to which a lien can attach, and, therefore, in such case the lien on the whole of the goods is gone. See cases cited in note 3 to p. 450, and cases in the following notes.

[2] Bill *v.* Bament, 9 M. & W. 35.

[3] Edan *v.* Dudfield, 1 Q. B. 551.

[4] Chapman *v.* Morton, 11 M. & W. 534. And see Street *v.* Blay, 2 B. & Ad. 456; Horncastle *v.* Farren, 3 B. & Ald. 497; Parker *v.* Palmer, 4 B. & Ald. 387; Campbell *v.* Fleming, 1 A. & E. 40; Hunt *v.* Silk, 5 East, 449.

vendee, — the right of *stoppage in transitu* still continuing in the vendor, — delay on the part of the vendee in notifying the vendor of his refusal to receive the goods will not supply the necessity of the actual receipt required by the statute.[1]

The case of Bushel *v.* Wheeler,[2] which has been much questioned, which we have fully examined in the previous Part, and which we think for reasons we have there stated is not well decided, seemed to assume that though the *stoppage in transitu* in that case[3] existed, there might still have been an actual receipt of the goods by the vendee. The reason assigned by Coleridge, J., for this is, that a memorandum in writing would take the case out of the statute, and yet that the lien of the seller and his right of stoppage would continue. That is perfectly true; and it is also true that where there have been but an acceptance and actual receipt of *part* of the goods, the case is taken out of the statute, because in the former case, the whole of the goods remain in the possession of the vendor, and, in the latter case, all of them except the part which has been actually received; so, in the former case, the vendor's lien and right of *stoppage in transitu* would continue to attach to the whole of the goods, and in the latter case, to the part not actually received by the vendee. But, to sustain Bushel *v.* Wheeler, it would be necessary to hold that the vendee had actually received the *whole* of the goods; that there had been an actual manual, constructive, or symbolical transmission of the possession of *the whole* of the goods, to him: and if so, this, obviously, of necessity would extinguish the lien and the right of *stoppage in transitu* in the whole of the goods, and the case of the memorandum in writing is entirely without point where, unlike that case, the actual receipt and possession of the whole of the goods are in the vendee. Obviously, Bushel *v.* Wheeler[4] is of no authority whatever, as regards the frequently quoted *dicta* which it contains.[5]

[1] Farina *v.* Howe, 16 M. & W. 119. And see Hanson *v.* Armitage, 5 B. & Ald. 557; Coates *v.* Chaplin, 6 Jur. 1123; Clarke *v.* Hutchins, 14 East, 475; Freeman *v.* Birch, 1 Nev. & M. 420; Swain *v.* Shepherd, 1 M. & Rob. 223; Elmore *v.* Kingscote, 5 B. & C. 583; Hoady *v.* Maclaine, 10 Bing. 482. But a keeping of and dealing with the *indicia* of ownership, as the bill of lading, may amount to a constructive receipt, to satisfy the actual receipt of the statute. Currie *v.* Anderson, 2 E. & E. 591. And see Meredith *v.* Meigh, 2 E. & B. 364; Morton *v.* Tibbett, 15 Q. B. 428.

[2] 8 Jur. 532.

[3] See *per* Coleridge, J. at p. 533.

[4] 8 Jur. 532.

[5] In Norman *v.* Phillips, 14 M. & W. 277, 283, Alderson, B., says: "The carrier is only an agent *for the purpose of carrying.*" For cases where there has been an actual receipt of the goods by the vendee, the right of *stoppage in transitu* being gone, see Nicholson *v.* Pavitt, 1 E. & E. 172; Foster *v.* Frampton, 6 B. & C. 107; Hammond *v.* Anderson, 1 B. & P. N. R. 69; Whitehouse *v.* Frost, 12 East, 614; Stoveld *v.* Hughes, 14 East, 308; Hurry *v.* Mangles, 1 Camp. 452; Harman *v.* Anderson, 2 Camp. 242; Withers *v.* Lyss, 4 Camp. 237; Spear *v.* Travers, 4 Camp. 251; Lucas *v.* Dorrein, 1 B. Moore, 29; Green *v.* Haythorne, 1 Stark. 447;

Where an order is given for goods and part of them are actually received, where there is also the necessary acceptance, and the

Hawes *v.* Watson, 2 B. & C. 540; Scott *v.* Pettit, 3 B. & P. 469; Richardson *v.* Goss, 3 B. & P. 119; Wentworth *v.* Outhwaite, 10 M. & W. 436; Allen *v.* Gripper, 2 Cr. & J. 218; Whitehead *v.* Anderson, 9 M. & W. 518; James *v.* Griffin, 2 M. & W. 623; Heinekey *v.* Earle, 8 E. & B. 410; Rowe *v.* Pickford, 8 Taunt. 83; Ellis *v.* Hunt, 3 T. R. 465; Dixon *v.* Baldwin, 5 East, 175; Morton *v.* Tibbett, 15 Q. B. 428; Smith *v.* Hudson, 6 B. & S. 431; Kibble *v.* Gough, 38 L. T. N. S. 204; Rickard *v.* Moore, 38 L. T. N. S. 841; Page *v.* Morgan, 15 Q. B. Div. 228. As there can be no actual receipt by the vendee, *i. e.*, no actual transmission of the possession to him, so long as the vendor's lien or right of *stoppage in transitu* continues, it follows as a necessary corollary that the carrier is not, contrary to the view expressed by Blackburn, Benjamin, and other writers, the vendee's agent to actually receive the goods, to take the case out of the statute; for if he were, the right of *stoppage in transitu* could not exist after the actual receipt of the goods by the vendee or his duly authorized agent. And another conclusion also results from a number of the above cases, viz., that even where, at the terminus of the transit, the dock-man or warehouseman is the agent of the vendee to *actually receive* the goods for him, the constructive possession of the goods being in the vendee, the dock-man or warehouseman, and, therefore, on the same principle, the carrier, where the latter is the vendee's own carrier, although he may be in such case the vendee's agent to receive the goods for him, is clearly not, as is shown by such decisions, the vendee's agent to accept the goods. This fact has probably led so many of the writers to state incorrectly, in effect, that though the carrier is not the vendee's agent to accept the goods, he is his agent to actually receive them. But, in fact, as the cases show, and as the principle clearly is, the carrier, *qua* carrier, is neither the vendee's agent to actually receive the goods for him, under the statute, nor to accept them; his receipt, during the continuance of the *transitus*, being that of the shipper, with his qualified lien still attaching to the goods. Another important conclusion also results from the fact, that while, as those cases correctly show, the dock-man, railway station agent, or warehouseman, and, therefore, the master of the vendee's own ship (whose position in the matter is strictly analogous to that of the warehouseman, etc.), may be the agent to actually *receive* the goods for the vendee, he is not the agent to *accept* them; showing, notwithstanding the *dicta* of so many of the English judges, and so many of the English cases in which this distinction is ignored, the marked difference really existing between the accepting and the actual receipt of the statute; the latter being, in effect, a corporeal act in the transmission of the very possession of the goods from the vendor to the vendee; the former, the exercise of the judgment by the vendee, — an act of the mind in accepting, approving, adopting, taking to the particular goods as the very subject of the contract.

The case of Norman *v.* Phillips, 14 M. & W. 277, stated by us, *supra*, in which Bushel *v.* Wheeler, 8 Jur. 532, is disapproved, is quite in point. There the goods were shipped by a railway, and on their arrival at the terminus, the vendee, being advised of their arrival, refused to receive the goods. Although considerable time elapsed before the vendee notified the vendor of his refusal to receive the goods, the court held that, if he had himself received the goods, by retaining them an unreasonable time, his acceptance of them might have been presumed; but having objected to receive them, they not having been delivered to him, acceptance in such a case could not be presumed. Alderson, B.: "Where goods are in a party's own hands, he has an opportunity of examining them, and his saying nothing in such a case would be evidence of acceptance by acquiescence." It is to be regretted that, even in this case, the usual failure to discriminate between the actual receipt and the acceptance of the statute is manifested. Thus Alderson, B., says (the italics being his own): "He must accept the goods, and *actually receive the same*, to constitute an acceptance within the meaning of the statute. Here the goods are sent in the usual way; but when they arrive at the carrier's warehouse, the defendant refuses to take them. That can scarcely be said to be an acceptance." When the vendee, on the goods arriving "at the carrier's warehouse," refuses to take them, then, as several of the above cases show, and as is clear law, the right of *stoppage in transitu* may be exercised by the vendor, and hence, in such case, the vendee has not "actually received the same," much less has he accepted them. It very clearly does not require both an accepting of the goods and an actual receipt of them "to constitute an acceptance of them within the

contract for the whole of the goods is an entire one, the receipt of the part takes the case out of the statute.[1]

The holding in Farina *v.* Howe[2] recognizes and establishes the distinction which exists between the acceptance and the actual receipt of the statute. There goods were shipped from abroad to England, by the plaintiffs, on the verbal order of the defendant, at a price exceeding £10. They were sent to a shipping agent of the plaintiffs in London, who received them and warehoused them with a wharfinger, informing the defendant of their arrival. The wharfinger handed to the shipping agent a delivery warrant, whereby the goods were made deliverable to him or his assigns by indorsement, on payment of rent and charges. The agent indorsed and delivered this warrant to the defendant, who kept it

meaning of the statute." Cusack *v.* Robinson, 1 B. & S. 299. It requires both an acceptance and actual receipt to satisfy the statute; but the acceptance and the actual receipt of the statute are essentially different entities, though, as Alderson, B., has intimated, an acceptance may be implied where the vendee, after receiving the goods which have been delivered to him, retains them an unreasonable time, without exercising his right of rejection — that is, his refusal to accept — after their actual receipt. As we have seen, where there has been a purchase by sample, and, on receipt of the bulk of the goods, if they do not correspond with the sample, they may be rejected. But if they are kept and dealt with by the vendee as owner, the acceptance of them will be implied. Chapman *v.* Morton, 11 M. & W. 534.

[1] Scott *v.* Eastern Counties Ry. Co., 12 M. & W. 33; Baldey *v.* Parker, 2 B. & C. 37; Shirley *v.* Heyward, 2 H. Bl. 509; Elliott *v.* Thomas, 3 M. & W. 170; Mills *v.* Hunt, 17 Wend. 333; 20 Wend. 431. Alderson, B., in Scott *v.* Eastern Counties Ry. Co., 12 M. & W. at p. 36, says: "If I make a contract for goods already made, and goods to be made, and I accept the goods made, it shows that I made the contract, which is what the act means." The act means, as it literally states, that there must be both an acceptance and an actual receipt of some part of the goods to supply the evidence of the contract. Where goods are ordered and actually received, and received without objection being made in a reasonable time, the acceptance, as we have seen, may be implied; but the acceptance is not by any means involved in the actual receipt alone. Goods which have not been accepted may be received and be rejected. But where goods already in the possession of a party are sold to him, and, as there is already the possession in him, if it appears that his conduct in dealing with them is wholly inconsistent with the supposition that his former possession continues unchanged, — if such facts are clearly shown, he may be properly said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the statute of frauds; as, for instance, if, in such case, he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alters the nature of the property, or the like. *Per* Alderson, B., in Lillywhite *v.* Devereux, 15 M. & W. 285. And see Edan *v.* Dudfield, 1 Q. B. 302, where Lord Denman, C. J., says: "We have no doubt that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts, without any writing between the parties, which amount to acceptance [and actual receipt]; and the effect of such acts, necessarily to be proved by parol evidence, must be submitted to the jury. We entertain this opinion after fully considering all the cases cited, especially Elmore *v.* Stone, 1 Taunt. 458; Nicholle *v.* Plume, 1 C. & P. 272; Maberley *v.* Sheppard, 10 Bing. 99, — agreeing that such evidence must be unequivocal; but thinking the question, whether it is so under all the circumstances, fact for the jury, not matter of law for the court." See Dodsley *v.* Varley, 12 A. & E. 632. In Lillywhite *v.* Devereux, 15 M. & W. 285, the court considered that the evidence did not warrant the finding of the jury that there had been an acceptance and actual receipt of the goods to sustain the alleged contract.

[2] 16 M. & W. 119; fully stated, *ante*, 366.

for several months, and, notwithstanding repeated applications, did not pay the price of or charges upon the goods, nor return the warrant, which he said he had sent to his solicitor; and that he intended to resist payment, as he had not ordered the goods; and that they would remain for the present in bond. In an action for the price, the jury having found for the plaintiff, the court held, that there was evidence to go to the jury of the defendant's *acceptance* of the goods by retaining the delivery warrant; but that there was no sufficient evidence of the *actual receipt* of the goods, that is, of the delivery of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee; and that the delivery and receipt of the warrant was not in effect the same thing as the delivery and receipt of the goods.[1]

There was an actual receipt of goods by the vendee, in Walker *v.* Nussey,[2] but as they were returned within a reasonable time as not being according to sample, it was held that there was no acceptance of them, notwithstanding their actual receipt.

In Curtis *v.* Pugh,[3] there was a purchase of Cox's best glue, the vendee subsequently receiving the glue, which the jury found was what he had purchased. The court held that, notwithstanding the actual receipt, the vendee had still the right of rejecting the glue. This is a perfectly clear principle: where there is no acceptance of the goods, they may clearly be rejected after their receipt, with or without reason, if there are no *laches*, or taking to the goods, on the part of the vendee. But the case here comes very close to that of the purchase of specific, ascertained goods, or the purchase of goods by sample, which the vendee may, notwithstanding the purchase, refuse to receive; but which, having received, as the purchase of specific goods is itself an acceptance of them, so far as he gets the identical goods he has bought, it would seem that that in itself is an acceptance of them within the meaning of the statute; and that, after his receipt of them, his right of rejecting them would be gone, if the jury found that they were the identical goods which he had bought, and agreed to accept as the subject of the purchase, as they did in Curtis *v.* Pugh.[4]

[1] And see Bentall *v.* Burn, 3 B. & C. 423; Bill *v.* Bament, 9 M. & W. 36; Hanson *v.* Armitage, 5 B. & Ald. 557; Howe *v.* Palmer, 3 B. & Ald. 321. But where the vendee has acted under the delivery order, so that the goods, although remaining in the warehouse, have been transferred to the vendee, that is a sufficient actual receipt to satisfy the statute. Searle *v.* Keeves, 2 Esp. 598. See also Zwinger *v.* Samuda, 7 Taunt. 265; Hurry *v.* Mangles, 1 Camp. 452; Harman *v.* Anderson, 2 Camp. 243; Caldwell *v.* Ball, 1 T. R. 205, 216.

[2] 16 M. & W. 302.

[3] 10 Q. B. 111, stated *supra*, 371.

[4] *Ibid.*

We have discussed this point very fully in our next preceding Part. Lord Denman, C. J., would seem to have apprehended this point in Curtis *v.* Pugh,[1] where he says: "The strongest way of putting the case would be that the vendee's conduct amounted to a provisional acceptance if the glue should prove to be Cox's best glue;" *i. e.*, that after the actual receipt of it he could not reject it, if it was the very subject which he had bought, and which the jury found that it was, viz., Cox's best glue. Of course, before the appropriation of it to him by the seller, he could not maintain trover for it, as it would require the actual receipt, also, to make the contract good. But, neither could he do so where the sale was by sample, whether the sample was or was not delivered to him as a part of the very bulk of the goods. Yet, though trover would not lie in either of these cases, there would seem in all of them to be good reason for holding that if, after receipt of them, they proved to be the identical goods which were bought, the vendee's right of rejection would be gone. The reader is referred to our very full consideration of this subject in our next preceding Part.[2]

In Saunders *v.* Topp,[3] on selection of sheep, which the defendant purchased, he directed them to be sent to a field of his, which was done. Two days afterwards he sent his shepherd to remove the sheep to his farm, from the field, and on their arrival he counted them, and said, "It is all right." This was held to be a sufficient actual receipt of the sheep, where the acceptance preceded the receipt, or was concurrent with it.

In Morton *v.* Tibbett,[4] the vendee not only received a bulk sample of the wheat he purchased; but he seems to have received, by his own carrier, the residue of the wheat, which was so effectually in his possession, that he sold it and changed its destination. This was a clear actual receipt, even though, had he not exercised ownership of it by selling it, thereby signifying his acceptance of it, he might have rejected it, if on timely examination of it he had found that it did not accord with the sample, and was not, therefore, the wheat which he had bought, and which he should have received. But where the vendee has actually received the goods, it is a question for the jury whether his subsequent dealing with them is or is not an acceptance of them. Thus, where the vendee bought a quantity of turnip-seed, and after receipt of it, spread it out thin, it was held to be a question for

[1] At p. 114.

[2] See our full examination there of Saunders *v.* Topp, 4 Ex. 390; Morton *v.* Tibbett, 15 Q. B. 428; Parker *v.* Wallis, 5 E. & B. 21; Nicholson *v.* Bower, 1 E. & E. 172; Cusack *v.* Robinson, 1 B. & S. 299; The Bog Lead Mining Co. *v.* Montague, 10 C. B. 481; Kibble *v.* Gough, 38 L. T. N. S. 204; Rickard *v.* Moore, 38 L. T. N. S. 84; Page *v.* Morgan, 15 Q. B. Div. 228.

[3] 4 Ex. 390.

[4] 15 Q. B. 428.

the jury, under the facts, whether this was done as an act of acceptance, or for the purpose of preserving it for the vendor.[1]

Where wheat, which was purchased by verbal contract, was sent by railway, and, on reaching the terminus, was warehoused in the name of the vendee, notice being duly given to him thereof; this, as it puts an end to the right of *stoppage in transitu*, is an actual receipt to satisfy the statute, even though the vendee should still have the right of rejecting the wheat as not being the goods he purchased.[2] And where the goods purchased were sent to a warehouse named by the vendee, where they were put under the control of the vendee to await his further directions, so as to put an end to all the rights of the sellers as the unpaid vendors, there was a sufficient actual receipt to satisfy the statute.[3]

But in Hart *v.* Bush,[4] where the defendant at Lancaster verbally ordered goods of the value of more than £10, to be sent to him at Lancaster from London by plaintiff, and he directed that the goods should be sent by sea from G.'s wharf, which was the only wharf in London whence goods were shipped for Lancaster; and from which wharf goods had previously been sent by plaintiff to defendant. Plaintiff sent the goods to G.'s wharf; whence the wharfinger sent them by a ship, selected by himself, for Liverpool; but the cargo was lost by the ship being wrecked on her voyage from London to Liverpool. It was held that this was not actual receipt to satisfy the statute; Lord Campbell, C. J., saying:

[1] Parker *v.* Wallis, 5 E. & B. 21.

[2] Nicholson *v.* Bower, 1 E. & E. 172. But where, in Bolton *v.* The Lancashire, &c. Ry. Co., L. R. 1 C. P. 431, on the arrival of the goods at the terminus of the route, the vendee refused to receive the goods, which remained in the possession of the carrier, it was held that the *transitus* had not ended. There, on July 12, 1864, W. sold P. eleven skips of cotton twist, then lying at the defendant's station at S., to be delivered for P. at B. station. Three of the skips were delivered on the 22d and paid for; but P., objecting to the weight and quality, declined to take any more of them. On Aug. 17, four more were sent to B. station, and an invoice of the eight was sent to P., with an intimation to him that four had been forwarded, and that the remaining four were lying at S. station, waiting his instructions. P. immediately returned the invoice, and wrote to W., saying that he declined to take any more of the twist. On Sept. 1, W. sent an order to S. station, directing the defendants to deliver the remaining four skips to P. These were accordingly forwarded to B. station, and were taken by P.'s car-man to his mill, but were immediately returned by P.'s orders; and the whole eight were sent back by him to S. station to the order of W. They were again returned by W. to B. station; but P. refusing to have anything to do with them, they remained there until P.'s bankruptcy on Oct. 19, when W. claimed them. It was held, upon a special case stated in an action of trover by P.'s assignee against the railway company, in which the court were to draw inferences of fact, that, under the circumstances, the *transitus* was never determined, and consequently, that the unpaid vendor, W., had a right to stop them. In James *v.* Griffin, 2 M. & W. 623, an intimation from the vendee that he did not intend to accept the goods, though they were delivered at a wharf where he had been accustomed to have goods landed for him, was held to keep alive the vendor's right of *stoppage in transitu*. See Whitehead *v.* Anderson, 9 M. & W. 529; Wentworth *v.* Outhwaite, 10 M. & W. 436; Morgan *v.* Gath, 3 H. & C. 748; Dodson *v.* Wentworth, 5 Scott, N. R. 821; Cusack *v.* Robinson, 1 B. & S. 299; Smith *v.* Hudson, 34 L. J. Q. B. 145.

[3] Cusack *v.* Robinson, 1 B. & S. 299.

[4] E. B. & E. 494.

"All that can be said is that the purchaser here named the wharf, and that there was a delivery at that wharf. I think that, where there is a verbal contract and an order to deliver to a particular carrier, a delivery to that carrier does satisfy the statute. But in the present case there was a delivery at the wharf only; the wharfinger had only to see that the goods were properly put on the wharf and hoisted on board ship." And where the ship was selected by the vendor in which the goods were shipped, the goods being consigned to a third party, who notified the vendee thereof, this was no actual receipt by the vendee, nor would it have been had the bill of lading been sent direct to him, as the right of *stoppage in transitu* would still continue; unless he assigned the bill of lading, in which case there would be a constructive receipt of the goods to satisfy the actual receipt of the statute.[1]

Kibble *v.* Gough,[2] which, on the question of acceptance, we have considered very fully in the next preceding Part, is, with the cases which have followed it and recognized its correctness, a case of the highest importance on this branch of the Statute of Frauds. It was an appeal from the decision of the Common Pleas Division. The defendant, a maltster, agreed to purchase of the plaintiff, a farmer, a quantity of barley, a sample of which was produced, but which was not dressed, at 35*s.* a quarter, on condition that it should be well dressed. The plaintiff promised that it should be dressed as well as machine could do it. A few days afterwards the plaintiff sent to the defendant for some sacks in which to send the barley, and a quantity was sent to him in the absence of the defendant by the defendant's foreman. On the same day the plaintiff sent in the first instalment of barley, thirteen quarters, which were received by the defendant's foreman, who examined the barley, and who returned a receipt with the words "not equal to sample." The defendant returned home late in the evening, and was informed of the delivery of the barley, and on the following morning inspected the barley and wrote to the plaintiff in the following terms: "I must refuse the barley, and do not send any more. It is full of grown corns and very spikey, and a lot of thin, and is not dressed as well as machine can do it." The plaintiff, however, sent a second instalment, and also a third, which were also received, in the absence of the defendant, by his foreman, and received a receipt for each, with the words "not dressed well" for the second instalment, and "not equal to sample" for the third. The defendant wrote to the plaintiff and asked him to take back the barley, but the plaintiff refused to do so. The defendant refused to pay for the barley, and wrote to the

[1] Meredith *v.* Meig, 2 E. & B. 364.

[2] 38 L. T. N. S. 204.

plaintiff that it was standing in the defendant's warehouse, at the plaintiff's risk, and subject to hire for warehousing, etc. In an action for the price, as for goods sold and delivered, the jury found that the statute had been complied with, and that the barley was equal to sample and well dressed.

On motion, before the Common Pleas Division, for a new trial, the verdict was sustained. On appeal, to the Court of Appeal, the appeal was dismissed.

Here, the actual receipt was evident; but, after the actual receipt, the rejection of the goods was as decided as it well could be. As we have pointed out in the previous Part, the only possible ground upon which this case is sustainable, is, that, as a purchase of specific goods by sample, the purchase itself was an acceptance, an approval, a recognizing, a taking to as the subject of the contract, of the specific goods bought, and which, *after their actual receipt*, could not be rejected, if they accorded with the sample, and were, as the jury in this case found they were, the very goods which were purchased. But for the introduction in the case of Lord Campbell's utterly unsound *obiter dictum* in Morton *v.* Tibbett,[1] that, in effect, there can, under the Statute of Frauds, be an acceptance which is not an acceptance, but which may be followed by a rejection, the decision would be clearer, as, in so many of the English cases, they would be much more intelligible than they are but for their confounding, as they do in fact, in Kibble *v.* Gough,[2] the acceptance and the actual receipt of the statute, as though accepting meant no more than receiving, and was always necessarily involved in it.[3]

As we have fully pointed out in our last preceding Part, there may be an acceptance of goods, and a refusal to receive them, as there might have been in either Cusack *v.* Robinson,[4] Saunders *v.* Topp,[5] or Kibble *v.* Gough.[6] And, on the other hand, there may be an actual receipt, as in Rickard *v.* Moore,[7] and as in many of

[1] 15 Q. B. 428.

[2] 38 L. T. N. S. 204.

[3] See, for instance, *per* Brett, J.: "Does not the delivery and receipt include acceptance?" Most certainly it does not. There may be a delivery and receipt, which may not only not include an acceptance, within the meaning of the statute, but there may be a rejection of the goods, as in the next case we state, — Rickard *v.* Moore, 38 L. T. N. S. 841, — which there could not be if there had been, with the actual receipt, an acceptance, as there would then be an executed contract "deemed good," and which could not be rescinded merely at the will of one of the parties. Or, on the other hand, there may be, *exclusive* of the actual receipt, an acceptance, preceding the actual receipt, as in Cusack *v.* Robinson, 1 B. & S. 299, where there has been a purchase of specific, ascertained goods; or, as in Kibble *v.* Gough itself, where there has been a sale by sample of specific goods, and, on the subsequent actual receipt, they shall be found to be the identical goods purchased; approved, recognized, adopted, accepted, taken to as the very subject of the contract.

[4] 1 B. & S. 299.

[5] 4 Ex. 390.

[6] 38 L. T. N. S. 204.

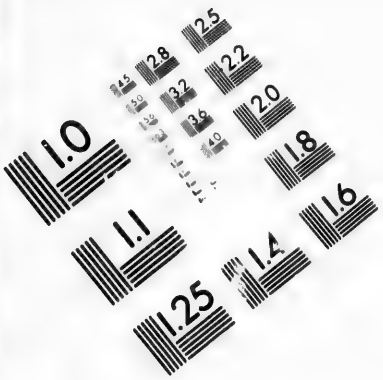
[7] *Ib.* 841.

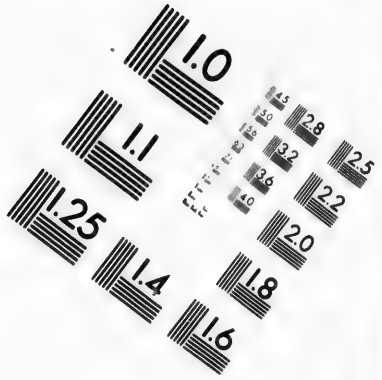
the cases cited in this and in the preceding Part; and yet, instead of an acceptance of them, an absolute rejection of the goods. This may be where there has been a purchase, but neither by sample, or otherwise, of specific goods, and the goods, on receipt, may be refused acceptance; or, it may be, where, by purchase by sample, or otherwise, there has been a purchase of specific goods, and, on receipt, it shall have been found that the goods are not the specific goods purchased; in the one case, not being a part of the designated goods purchased, and, in the other, not according to the sample; so as, in neither case, to be a part of the approved, accepted, recognized goods as the very subject of the contract.

But, in this is not involved the accepting, and also its exact opposite, the rejecting of the same goods. The receiving is not the accepting. The rejecting is not the refusal to receive, but it is the refusal to accept. There may be the right to accept or the right to reject, but there cannot be both an acceptance and a rejection of the same subject, although there may be a receipt, which, where there has been no preceding or concurring acceptance, may be followed by either an acceptance or a rejection, but not by both. Clearly, there cannot be an acceptance and a rejection both of the same subject within the meaning of the Statute of Frauds. All, in fact, that Kibble *v.* Gough[1] holds is, that the goods were actually received; that they were specific goods purchased by sample, which was itself an acceptance of them; and that, therefore, on their actual receipt, they could not be rejected, if they accorded with the sample, and were, therefore, the very goods which were purchased, approved, agreed upon, identified, recognised, taken to, accepted, as the very subject of the contract between the parties; and, therefore, the requirements of the statute of an acceptance and an actual receipt having been met, the contract was to be "deemed good," and the goods could not thereafter be rejected, and the contract rescinded, simply at the will of one of the parties. But, on the other hand, notwithstanding the contract, but in virtue thereof, after the actual receipt, if the goods were not the specific goods which were bought, whether by sample or otherwise, they could be rejected, because they had never been accepted, and, like any other unaccepted goods, could still be rejected, notwithstanding the actual receipt, because the statute requires that they shall be as well accepted as actually received.

We dwell on this subject because of its importance; and because even in this late and important case, which we think is undoubtedly well decided, although (and from the fallacious reasoning

[1] 38 L. T. N. S. 204.





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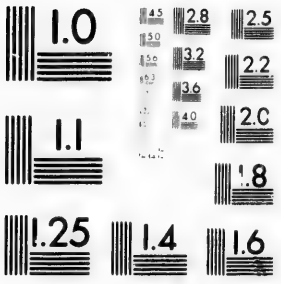

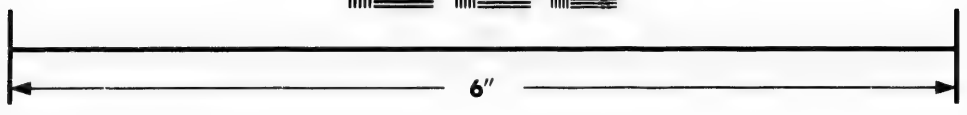

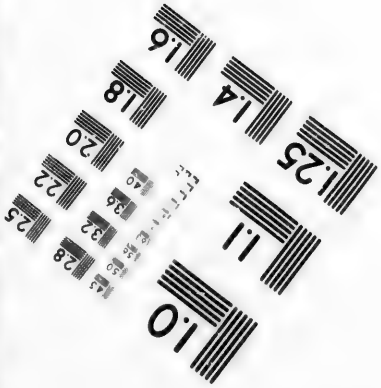

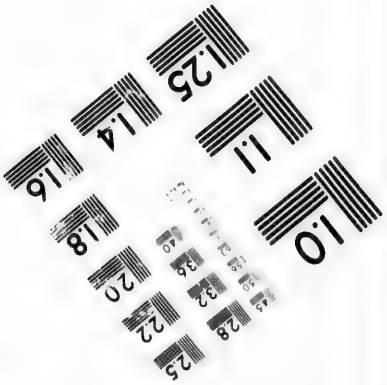

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with which it abounds it is not at all a matter of surprise that he should have done so) we find Bramwell, L. J., who was one of the judges who decided Kibble *v.* Gough,[1] throwing doubt in Rickard *v.* Moore[2] on his own decision in Kibble *v.* Gough; yet it fairly abounds in fallacies, — not only approving the utterly unsound *obiter dictum* of Lord Campbell in Morton *v.* Tibbett,[3] that, in effect, there can be, under the statute, both the acceptance and the rejection of the same goods, but (not seeming to comprehend the difference between the rejecting goods which have not been accepted and the contradiction involved in both accepting and rejecting the same goods) stating principles which are entirely unsound. The decision in Kibble *v.* Gough we think entirely sound, and the case, on that account, a most valuable one. We think much of the reasoning in it is grossly unsound, and calculated to perpetuate error.[4]

[1] 38 L. T. N. S. 204.
[2] *Id.* 841.
[3] 15 Q. B. 428.
[4] We have not only the fallacy of Brett, L. J., referred to in our note, *ante*, p. 460, of confounding acceptance with receipt, but the great mass of his judgment is based on the palpable contradiction that there can be an acceptance and a rejection, under the statute, of the same goods. In the first part of his judgment, Brett, L. J., states, not with absolute accuracy, but with not much incorrectness, the right of the vendee to reject goods after their receipt, which have been bought by sample, and which do not conform to the sample. He proceeds: "There must be an acceptance and an actual receipt; no absolute acceptance, but an acceptance which could not have been made except on admission of the contract and the goods sent under it. I am of opinion that there was a sufficient acceptance under the statute of frauds, although *there is a power of rejection*. That seems to me to be the decision in Morton *v.* Tibbett, 15 Q. B. 428, and in Cusack *v.* Robinson, 1 B. & S. 299." It is difficult here to understand what Brett, L. J. means, because Cusack *v.* Robinson holds that there was an acceptance, and no power of rejection, — a power to *refuse to receive*, but no power to *not accept*, or to reject; there having been an acceptance, which, however, might have been followed by a refusal to receive. As Brett, L. J., had, however, previously confounded accepting with receiving, he may be further confounding rejecting with the refusal to receive, treating it rather as the converse of the actual receipt of the statute, than of the accepting which is also required. Taking his judgment, however, as a whole, it is difficult to make any sense of it. He proceeds: "Blackburn, J., cites Morton *v.* Tibbett with approbation. But the most remarkable approbation of Morton *v.* Tibbett, is by Crompton, J., in Currie *v.* Anderson (29 L. J. N. S. 87 Q. B.), when citing from Lord Campbell's judgment: 'After a careful review of the cases, the court came to the conclusion (which in this court must be considered the law of the land) that in order to make an acceptance and receipt within the statute of frauds, it was not necessary that the vendee should have done anything to preclude himself from objecting to the goods.' That was the decision in Morton *v.* Tibbett [In Morton *v.* Tibbett, as we have shown, *ante*, p. 376 *et seq.*, there were a receipt and an acceptance of bulk samples, a part of the goods; and there was an actual receipt of the residue, and such a dealing therewith, a taking thereto, as owner, by a sale and change of destination, as implied an acceptance; and it was held that the vendee was thereafter bound by his contract, which, under the statute, was to be "deemed good," and that, thereafter, he had no power of rejection within the meaning of the statute]; and from the discussion of to-day, I see reason to be more satisfied than ever with it. Having considered all these cases, I think the decision in Morton *v.* Tibbett is right, and that such an acceptance is sufficient, although the purchaser in certain cases [namely, where there has been no acceptance, notwithstanding the actual receipt] may still have his right of rejection. Here there was [*sic*] sufficient receipt and acceptance [here, apparently, rather using these words as the equivalent of delivery and receipt] to pass the property, and there was a binding contract [then, clearly, there were the acceptance and actual receipt of

Our reasoning is also sustained by the next succeeding case of Rickard *v.* Moore.[1] In this case there was a sale to the defend-

the statute, and that ended it. The contract was then to be "deemed good"] ; and the question is, can an action be maintained for the price of the goods. Now, the first lot was actually delivered, and I shall use the term, actually received. [From which, evidently, he implies that which he ignores, actual *acceptance.*] The goods were sold by valid contract [itself an acceptance], actually delivered and received, and after this the vendee objects to them [as clearly he might, if, by the very sale of these specific goods by sample, he had not already, within the meaning of the statute, and of the term at common law, already "accepted" them]. If they had not been equal to the sample, I say that it was not even then too late to object ; but they were equal to sample, and they were dressed. Now, where by a contract under which there is a right to reject, and there has been an actual delivery and an actual receipt, and the state of the goods is such as to give no right to reject, any attempt to reject them without such right is futile, and the goods are goods not only sold, but sold and delivered ; and this, I think, is the case here."

All this, making allowance for the confusion of Brett, L. J., with reference to the essentially different things of the acceptance and the actual receipt of the statute, might be construed to mean, and if so, would be entirely correct, that where there has been a receipt and no acceptance, there there may be a rejection. This will help to clear up the confusion. Thus, where there have been an acceptance and actual receipt, there there can be no rejection. But where there has been an actual receipt, and no acceptance, there there may be a rejection. This, unquestionably, is the clear law of the statute. And, after the acceptance and actual receipt of the statute making the contract to be "deemed good ;" and, *dehors* fraud, preventing its rescission or the subsequent rejection of the goods, at the will of one of the parties to the contract, yet the vendee, as at common law, would have his rights and remedies as to any express or implied warranty connected with the sale of the goods which had been accepted and actually received.

Bramwell, L. J., and Cotton, L. J., are as unsound. The latter says : "Is there a contract under the statute of frauds ? It is an undoubted fact that there is here a verbal contract, but there must also be an acceptance and a receipt. There is certainly a receipt here, but is there an acceptance ? I quite agree with the principles laid down in Morton *v.* Tibbett, 15 Q. B. 428. The object of the statute is that, where there was no contract in writing, there must be some overt act to render the bargain binding. The court will look at parol evidence of a contract when the statute is satisfied. All that is wanted is a receipt, and such an acceptance of the goods as shows that it has regard to the contract, but the contract may yet be left open to objection ; so that it would not preclude a man from exercising such a power of rejection ;" *i. e.* there could be an acceptance, and at the same time its exact opposite, a refusal to accept, — a rejection !

So Bramwell, L. J. : "A man may *accept* goods [had he here said *receive* goods, instead of accept, this part of his judgment at least, would have been quite accurate] without losing his right of objection to them ; there must be such an acceptance to satisfy the statute as amounts to a recognition of the contract between the parties ; and I can quite understand that there may be a delivery without an acceptance by the vendee, and without a recognition on his part that he has bought the goods." Substituting, as we have suggested "receive" for "accept" in the above, and all the error is eliminated from the paragraph.

The following, then, are perfectly sound propositions : *First.* A man may receive goods without losing his right of objecting to them. *Second.* An acceptance is a recognition, an acknowledging, an approving, a taking to as the very subject of the contract, of the goods which have been purchased under the verbal contract. And therefore, *Thirdly :* There may be a delivery without an acceptance by the vendee, and without a recognition (an acknowledging, approving, accepting), on his part that he has bought the goods. To which we may add, *Fourthly :* And hence, where there has been but a receipt, and no acceptance, prior, concurrent with, or following the actual receipt, and no dealing with the goods by the vendee, or *laches* on his part, from which an acceptance may be implied, the goods may be rejected, as they may be if (having been bought by sample, or being specific goods, they have thus been recognized, approved, accepted, as the subject of the contract) after their receipt shall have proved not to be the specific goods purchased or not to conform to the sample.

These propositions are amply sustained by the actual holding in Kibble *v.* Gough,

[1] 38 L. T. N. S. 841.

ant by sample, in July, of six bales of wool. On the 27th the defendant received an invoice of the wool, which, shortly after, arrived at the railway station at the defendant's place of business. On the 31st he removed it from the station to his own premises, where he examined it, and found it inferior to sample, and immediately wrote the plaintiff (the vendor) to that effect. The plaintiff answered by letter on the 1st of August, claiming that the wool was equal to the sample, — the letter arriving at its destination in the defendant's absence. On his return on the 4th, he submitted the wool to further inspection, and finding his previous view confirmed, returned the wool to the railway station, and advised the plaintiff that he refused to accept it. There was also some evidence that, between the 31st July and the 4th August, the defendant had offered the wool for sale. In an action for the price the statute was relied on. The jury found that the goods were not equal to sample, and the verdict and judgment were for the defendant. On appeal, Kibble *v.* Gough [1] was relied on; and

38 L. T. N. S. 204, and the following further from Bramwell, L. J., is only correct so far as it accords with the above propositions, and with the comments in the two paragraphs immediately preceding this: "But in this case the goods had been brought to the defendant's warehouse, and were received, not by the defendant himself, but by a person in whom, as the evidence showed, he put trust and confidence, and this person compared the barley with the sample and took it in. There is no doubt whatever that he received it. Suppose that the defendant himself had been present, the question would be just the same, and it can make no difference that his manager received the goods. *It is to be remembered that these were specific goods.* I am of opinion that there is sufficient evidence of acceptance. The defendant might have complained just as though there had been a contract in writing, *if the goods were not up to sample.* There may be defects in goods which are not ascertainable on inspection, or which require an elaborate inspection or which require the goods to be used before the defects can be discovered, so as not to preclude sufficient evidence to take the case out of the statute."

It is not at all a matter of surprise, we think, after such "reasoning" as the case contains, that Kibble *v.* Gough, though thoroughly well decided, and expressly approved and distinguished in Page *v.* Morgan, 15 Q. B. Div. 228, from Rickard *v.* Moore, 38 L. T. N. S. 841, should, in this latter case, be, as it is, doubted by even Bramwell, L. J., himself, so entirely unsound and irrational is much of the reasoning, like that of Lord Campbell in Morton *v.* Tibbett, 15 Q. B. 428, which it contains. From the general reasoning in Kibble *v.* Gough, 38 L. T. N. S. 204, and from the express approval in it of the unsound, extra-judicial view of Lord Campbell in Morton *v.* Tibbett, 15 Q. B. 428, that there may be an acceptance and also at the same time, its exact opposite, a rejection (a refusal to accept), of the same goods, we should have been prepared to expect that Kibble *v.* Gough would have held that the goods in that case, though they had been accepted, might, notwithstanding the acceptance, have been also rejected; *i. e.* both accepted and rejected. But, on the contrary, the *rationale* of Kibble *v.* Gough really is, that the goods, having been accepted, being specific goods bought by sample, and thus, by that very act, accepted, — recognized as the very subject of the contract, — could *not*, after their actual receipt, be rejected; although with the greatest promptness, immediately after their receipt, the vendee did all in his power to reject them. Yet had they not conformed to sample, as they would not then have been the goods which had been selected, recognized, accepted, as the very subject of the contract, as they had not been accepted, they could, after and notwithstanding their actual receipt, be summarily rejected. The actual holding in this case, opposed to the reasoning of Lord Campbell in Morton *v.* Tibbett, and to Bramwell, Brett, and Cotton, L. JJ., in Kibble *v.* Gough itself, fully sustains the whole trend of our reasoning in this and in the next preceding Part.

[1] 38 L. T. N. S. 204.

it was claimed that there had been an acceptance and actual receipt by the defendant. Here, the case essentially differs from the facts in Kibble *v.* Gough. In that case the very goods — specific goods purchased by sample (in itself an acceptance by the vendee, — a "recognition that he had bought the goods," to use the words of Bramwell, L. J., in Kibble *v.* Gough) — were actually received, and hence, having been accepted and received, could not be rejected; although in Rickard *v.* Moore, where Bramhall, L. J., confessing himself puzzled "as to what constitutes 'acceptance' within the Statute of Frauds" (in accordance with his unsound reasoning in Kibble *v.* Gough, which evidently shows that he was "puzzled"), intimates that in Kibble *v.* Gough there might have been both an acceptance and (at the same time) its exact opposite, — a rejection of the identical goods which had been accepted. But, in Rickard *v.* Moore, the goods, not having been equal to sample, were not the goods which were purchased, approved, recognized, taken to as the very subject of the sale, accepted; and hence, not having been accepted, could, even after their actual receipt, be rejected. And, as both acceptance *and* actual receipt are required to satisfy the statute, not having been accepted, but having been, on the contrary, rejected, there was no contract to be "deemed good" under the statute. The Court of Appeal, in what we think is the perfectly well-decided case of Rickard *v.* Moore,[1] affirmed the judgment of the court below.

Kibble *v.* Gough[2] and Rickard *v.* Moore[3] are, we think, both well-decided cases. Where the two cases essentially differ is, that in the former there was a purchase by sample of specific goods (itself an acceptance), and, on the actual receipt of those very goods, which had been the special subject of the contract, they could not be rejected, as, by their very purchase, they had been approved, recognized, accepted as the very subject of the purchase, and, therefore, could not be both accepted and, at the same time, its exact opposite, — rejected.

But in Rickard *v.* Moore[4] the purchase was, also, a purchase by sample of specific goods, — itself an acceptance, a recognition, an assenting to of those very goods; and hence, after their actual receipt, having been accepted, they could not have been rejected. But, in fact, they never were actually received. The goods which were actually received were not the goods which had been approved, recognized, assented to, accepted, but entirely different goods, not according with the sample; and, hence, not having been accepted, could be, as they were, rejected. But for

[1] 38 L. T. N. S. 841.
[2] *Ib.* 204.
[3] 38 L. T. N. S. 841.
[4] *Ibid.*

this distinction, Bramwell, L. J.'s, doubts, in Rickard *v.* Moore, of the soundness of his own holding in Kibble *v.* Gough, would have been quite well founded; for, after the actual receipt of the goods, the acts of rejection in Kibble *v.* Gough were both more prompt, more decided, and in every way less equivocal than in Rickard *v.* Moore. But, in Rickard *v.* Moore, the right of rejection remained after the actual receipt, because the goods received were not the goods which were purchased; and hence they had never been accepted, recognized, approved, assented to as the very subject of the purchase. In Kibble *v.* Gough, on the contrary, they were the very goods which were purchased, accepted, approved, recognized, assented to, adopted as the very subject of the purchase; and hence, after having been actually received, having been accepted, necessarily could not be the subject of the very opposite action, — rejected.

The distinction we have drawn betweed Kibble *v.* Gough[1] and Rickard *v.* Moore[2] is fully sustained by the latest English decision (A. D. 1885); that in Page *v.* Morgan,[3] although there, as in so many of the English cases, there is still the assumption that, with respect to the same goods, under the same contract, there can be under the statute both an acceptance and its exact opposite, a rejection. But the case itself, quite in harmony with the perfectly consistent cases of Kibble *v.* Gough and Rickard *v.* Moore, is, we think, unquestionably well decided.

Here, as in the two previous cases, the sale was of specific goods, by sample. The wheat which was the subject of the sale was bought by verbal contract, by the defendant from the plaintiff. It was shipped by the plaintiff to the defendant's mill, on a canal barge, arriving at the mill on the evening of March 25. At 8 c'clock on the morning of the 26th, some of the sacks of wheat were hoisted out of the barge to the mill and examined by the defendant's foreman. After twenty-four sacks had been hoisted up and examined, the foreman sent for the defendant, who went to the mill, and inspected the twenty-four sacks, and fourteen additional which he had hoisted up for examination, and then, at 9 o'clock on the same morning, he told the bargeman to send up no more, as he said the wheat was not equal to sample. The defendant then, on the same day, notified the vendor's agent at a neighboring town that the wheat was not equal to sample, and that he should not take it. Some days afterwards the wheat was returned by the defendant to the barge, and, the plaintiff refusing to take it away, it remained there until after action was brought, when it

[1] 38 L. T. N. S. 204.
[2] *Ib.* 841.
[3] 15 Q. B. Div. 228.

was sold by the order of a judge, and the proceeds paid into court. The jury found that the wheat was equal to sample, and the verdict was for the plaintiff, which was sustained by the Court of Appeal, affirming the decision of the Queen's Bench Division.

Here, the rejection of the goods, after their actual receipt, was much more prompt and decided, and in every way less equivocal, than in Rickard *v.* Moore.[1] In fact, the goods were absolutely rejected, as far as that was at all possible, before they were fully received. All the difference between this case and Rickard *v.* Moore is, then, as regards their acceptance, that in Page *v.* Morgan the jury found that they were the actual goods bought, and, by that very act, therefore, were accepted as such, and hence, being those identical goods, could not, after their actual receipt, be rejected on the ground that they were not the goods purchased, when, in fact, they were; while, in Rickard *v.* Moore, the goods received never having been accepted, — those delivered not according with the sample, being not the same as those bought, — after their actual receipt they could be rejected, never having been accepted, and, therefore, there was no contract which under the statute could be "deemed good."

But in Page *v.* Morgan, the very goods which had been purchased, being thus approved, recognized, accepted as such, having been actually received, there was *then* a contract "deemed good" under the statute, and hence they could not thereafter be rejected, as the contract, being then "good," under the statute, could not be rescinded at the will of merely one of the parties to the contract. But, obviously and conclusively, there could not have been, as it is falsely reasoned even in Page *v.* Morgan that there might have been, first, the actual receipt and the acceptance under the statute, causing the contract to be "deemed good," — absolutely, conclusively, unchangeably "good," — and, at the same time, in respect to the very same goods, also the exact opposite of an acceptance, a rejection of the goods on the ground that the contract was not to be deemed good.

So, while we think the cases of Kibble *v.* Gough, Rickard *v.* Moore, and Page *v.* Morgan are all well decided; and, as regards the *ratio decidendi* of these cases, that they are in the strictest harmony with each other; yet we think they abound in unsound reasoning, the result, as Bramwell, L. J., himself put it in Rickard *v.* Moore,[2] of their being "puzzled as to what constitutes acceptance within the Statute of Frauds," and of the confusion running through a whole century of the English cases, resulting from their treating the acceptance and the actual receipt as being, as the

[1] 38 L. T. N. S. 841.

[2] 38 L. T. N. S. at p. 842.

judges in some of the cases expressly state, and in very many more of them imply, "essentially the same;" when, in fact, they are essentially different, because the statute renders it necessary that, to make the verbal contract be deemed good, the vendee must "*accept* some part of the goods sold, AND *actually receive* the same."

We think it clear, then, that the vendee may accept goods and refuse to receive them; that he may receive goods, which he has not accepted, and refuse to accept them, or, which is the same, reject them; but that he cannot receive goods, accept them, *and* reject them. Reasoning to the contrary is, we think, simply atrocious, no matter in what courts or with what judges it may be found; and the result of such reasoning is so entirely unreasonable a construction of the Statute of Frauds, as necessarily and naturally to "puzzle" and involve in palpable absurdity those who have resorted to it, as has been done in so many of the English cases on the subject.

We state the remainder of the English cases on the actual receipt of the statute.

In Hunt *v.* Hecht[1] the defendant agreed to purchase some bones to be selected out of a heap, which he authorized to be received by a wharfinger. The vendor accordingly sent a quantity of bones to the wharfinger, but on the following day, the vendee examined the bones and refused to accept them, on the ground that they were not the bones he had bargained for. The court held that although there was an actual receipt of the bones, as they were not the bones which were bought, they were not accepted, and could be rejected. Pollock, C. B., said: "All that the defendant agreed to buy was a quantity of bones of a particular description, to be separated from others in the heap. He afterwards sent to the plaintiff a note addressed to a wharfinger, authorizing the latter to receive and ship the bones; but when the defendant saw them at the wharf, he found that they did not correspond with his order and refused to accept them. Therefore, although there was a receipt of the goods by a person who had authority from the defendant to receive them, there was no acceptance."[2]

[1] 8 Ex. 814.

[2] Martin, B., in Hunt *v.* Hecht, 8 Ex. 814, saw that an acceptance was something otherwise, and more than a mere receipt, and that the view of Lord Campbell, C. J., in Morton *v.* Tibbett, 15 Q. B. 428, that there could be an acceptance and actual receipt, and then a rejection of the goods, was not tenable. The view, too, that the purchaser "was only bound to accept" the goods which he had purchased, also points to the fact that, under the statute, as at common law, the fact of there being a definite contract of purchase and sale is in itself an acceptance of the very subject of such contract, but not an acceptance of something else. Martin, B.'s, judgment *in extenso* is: "The question is, whether the defendant has accepted and actually received the goods bargained for. The contract was to buy such bones as were ordinary merchantable bones. It ap-

The acceptance in Holmes *v.* Hoskins[1] was very clear, but there was no actual receipt. Here there was the specific purchase of fifteen head of cattle for cash, and the cash was not paid, nor the cattle removed from the actual possession of the vendor, who held them as unpaid vendor, with his lien attached, although they were being fed with the purchaser's hay. Parke, B., here comes pretty near discriminating properly between the acceptance of the specific cattle as the subject of the purchase, which was clear in the case, and the actual receipt of the statute, which was entirely wanting, where he says: "In order to satisfy the statute, there must be an *acceptance, and an actual or constructive delivery.*"

Now in this case there was no actual delivery; and therefore, to entitle the plaintiff to recover, there must be such a dealing with the cattle by the defendant as owner, that the plaintiff would lose his lien. But it is clear that the plaintiff never meant to

pears that there were various sorts of bones intermixed in a heap, and that there was no purchase of the bulk, but of a certain article to be selected from it. *The defendant was only bound to accept merchantable bones;* and an order is given to a wharfinger to receive those bones. No doubt in one sense the goods were received [here it is again evident how very nearly receive is treated as accept] by the defendant, because they were received by a wharfinger directed by him to receive them. But the question is, whether there has been an acceptance to satisfy the statute. There are various authorities to show that, for the purpose of an acceptance within the statute, the vendee must have had the opportunity of exercising his judgment with respect to the article sent. [Compare this, with respect to extent, where there has been a sale, for instance, by sample, with our comments, *supra*, on Kibble *v.* Gough, 38 L. T. N. S. 204; Rickard *v.* Moore, 38 L. T. N. S. 841, and Page *v.* Morgan, 15 Q. B. Div. 228.] Morton *v.* Tibbett, 15 Q. B. Div. 428, has been cited as an authority to the contrary; but in reality that case decides no more than this, that where the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same. The court, indeed, there say that there may be an acceptance and receipt within the statute, although the vendee has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. But, in my opinion, an acceptance, to satisfy the statute, must be something more than a mere receipt [it is noticeable with what hesitancy even this statement is made]; it means some act done after the vendee has exercised, or had the means of exercising, his right of rejection;" which, we submit, is quite right, where there exists "the right of rejection," *i. e.*, where there has been no previous acceptance.

As a matter of common sense, it would seem to be a self-evident proposition, which should not be open to question or attempted refutation, that, to satisfy the statute, goods are not accepted until they are accepted, and that, as they cannot be both accepted and at the same time rejected, it inevitably follows that, notwithstanding their actual receipt, so long as they are open to rejection, they have not been accepted. Of course these self-evident, apparently undeniable propositions have not the concurrence, as we have seen in our previous Part of the views of such eminent lawyers as Lord Campbell, Lord Denman, Lord Coleridge, *et hoc genus omne*, but we think, notwithstanding this, that they are none the less true. The very construction of the statute itself shows that, in the minds of the framers of the act, the acceptance is, as was the case at common law, on the usual purchase of goods, an entity in itself independent of the actual receipt, which it usually precedes; thus (1) acceptance; (2) actually receive the same. If the acceptance was something dependent upon, resulting from or usually succeeding the receipt, the language more properly would have been reversed, except the purchaser shall (1) receive and (2) accept.

[1] 9 Ex. 753.

part with the cattle until the price was paid; and there is no ground for holding that the mere giving permission to feed the cattle changed the possession. Coming so near the proper distinction between the acceptance and the actual receipt, as they frequently did, it is remarkable that the accurate distinction so often escaped them. For here, although the *only* question in the case was whether there was such a constructive receipt of the cattle as met the requirements of the actual receipt of the statute, the very language we have quoted from Parke, B., was preceded by — "I am of opinion that there was no reasonable evidence to go to the jury *of an acceptance* and receipt of the cattle," — while the evidence of their acceptance, as recognizing, approving, assenting, taking to them, as at common law, as the very subject of the purchase, as in Cusack *v.* Robinson,[1] was beyond any question; all that was further required being the actual or constructive change of possession to satisfy the requirements of the statute.

In Bigg *v.* Whisking[2] various lots of timber, in different localities, were purchased by the defendant from the plaintiff, during the same day, and, at the close of the purchases, a memorandum was made between the parties of the whole transaction. The defendant received part and refused the rest. The purchases were held to be one entire transaction. There was here again, as in Cusack *v.* Robinson,[3] an acceptance of the goods as the subject of the purchase; and the actual receipt of a part of the timber, thereafter, was sufficient to satisfy the statute.

Where the jury found that the terms of the contract for the sale of a specific horse were complete, which amounted to an acceptance of the horse as the specific subject of the contract, the vendee then lending the horse to the vendor; it was held that this was a sufficient actual receipt of the horse to satisfy the statute, the effect of the finding of the jury being that the possession of the vendor was that of the vendee, and was not in the character of unpaid vendor; and, therefore, that the vendor had lost his lien, and the vendee was liable for the price of the horse as for goods sold and delivered.[4]

But where there was a purchase of all the whalebone which the vendor could procure, which, in effect, under the statute, would amount to an acceptance of it as the very subject of the purchase; as the receipt of a carrier is not the receipt of the vendee, an action against the carrier for a loss of the goods could not be sustained by the vendee, he not having actually received the goods, so that, under the statute, the property would have passed to him,

[1] 1 B. & S. 299.
[2] 14 C. B. 195.
[3] 1 B. & S. 299.
[4] Marvin *v.* Wallis, 6 E. & B. 726.

under a contract "deemed good;" as the contract, under the statute, will only be deemed good when there have been both the acceptance and the actual receipt.[1]

Where, however, there has been an acceptance of the goods by the vendee, and they have been shipped by a carrier, by the vendor, but simply as the agent for the vendee, the carrier being the vendee's own carrier, in which case the vendor would have no right of *stoppage in transitu*, the actual receipt of the statute is satisfied, and the vendee is liable for the goods as for goods sold and delivered.[2] And where there was a sale of specific goods by sample, in bond, and, after the sale, the goods continued to be held in the vendor's bonded warehouse, but in the capacity of warehouseman only, it was held that the vendor's lien as unpaid vendor was gone, and that there was a sufficient actual receipt of the goods to satisfy the statute.[3]

In Simmonds *v.* Humble[4] the question before the jury as to an actual receipt under the statute was entirely ignored, — the question there having simply been whether there was an acceptance of the goods sold. There there was a sale of hops by sample, and the bulk was recognized as according with the sample: so the acceptance was clear. As stated by Williams, J., "There was not only a verification of the bulk by comparison with the sample, but a weighing and approval by the agents of both parties." And although, as is noticed by Williams, J., "No point appears to have been made as to whether there was a sufficient receipt," as the hops were in the possession of a third party as warehouseman, and the result was, that, as soon as the sale was perfected (*i. e.* so that there would have been a good contract for the specific goods at common law), the warehouseman began to hold the hops for the buyer, there was also the actual receipt of the statute.

In Barnett *v.* Farley[5] the actual receipt was very similar to that in Kibble *v.* Gough,[6] Rickard *v.* Moore,[7] and in Page *v.* Morgan;[8] but there seems to have been no acceptance in this case of the goods, — which were a chattel made to order for a particular purpose, — and it was claimed that they were not made according to the order, nor fitted for the purpose, and as, on their receipt, the chattel was promptly rejected, it was held that there had been no acceptance of it within the meaning of the statute.

The question came up in Cooper *v.* Bill[9] whether there had or

[1] Coombs *v.* The Bristol, &c. Ry. Co., 3 H. & N. 510.
[2] Currie *v.* Anderson, 2 E. & E. 592.
[3] Castle *v.* Sworder, 6 H. & N. 828, reversing s. c. 5 H. & N. 281.
[4] 13 C. B. N. S. 258.
[5] 11 L. T. N. S. 107.
[6] 38 L. T. N. S. 204.
[7] *Ib.* 841.
[8] 15 Q. B. Div. 228.
[9] 3 H. & C. 722.

had not been a transmission of the possession of property to put an end to the vendors' lien and to their right of *stoppage in transitu*. The facts showed a clear acceptance of the goods had the question arisen under the Statute of Frauds. The court held, that, as the vendors had delivered the goods to the shipping-wharf for the vendee (the vendee having given his promissory-notes for the subject of the purchase, — timber, and having there marked and squared it after its arrival at the wharf), the property and possession had passed to the vendee, so that he would have been liable for the notes even though the timber had been thereafter destroyed, and that there had been a change in the possession of the timber which defeated the lien and terminated the *transitus* as to the vendors, even though, under the contract, the duty still devolved upon them to incur expense in the removal of the timber to another part of the wharf, where it could be removed by canal-boats. The same facts would show an actual receipt to satisfy the statute; the effect of the change in the property and possession being the same in the one case as in the other.

The case of Smith *v.* Hudson,[1] which we have fully examined (*supra*, 415), and which we think is, as we have shown, more than doubtful on the question of acceptance under the statute,[2] is per-

[1] 6 B. & S. 431.

[2] On the authority of Kibble *v.* Gough, 38 L. T. N. S. 204, Rickard *v.* Moore, 38 L. T. N. S. 841, and Page *v.* Morgan, 15 Q. B. Div. 228, we think that, as in Smith *v.* Hudson, 6 B. & S. 431, the sale was by sample, the goods lying in the vendee's possession for four days without objection; had the vendee been solvent, and the action had been against him for the price of the goods as for goods sold and delivered, the decision must have been against him, unless, at the very least, he could have shown that the goods which he had actually received were not according to sample, and hence were not the very goods which he had purchased, approved, recognized, accepted, as *per* sample, as the very goods which he was to receive. Hence, we think, it is clear that, after the actual receipt of the goods by the vendee, so that the vendor's right of *stoppage in transitu*, and lien as unpaid vendor, were gone, the vendor could not recover the goods back again, or in himself rescind the contract, simply because it might have been in the power of the vendee, if executed promptly on the actual receipt of the goods, to have rejected the goods if it had been found, as it was not in Smith *v.* Hudson, 6 B. & S. 431, that the goods were not according to sample, and, therefore, were not the goods which were actually purchased, and, on the assumption that they conformed to the sample, actually received as the accepted, assented to, subject of the purchase. We think it clear, on the authority of the above-named cases, that the vendor could not, most certainly, recover the goods back again without at least showing that they did not conform to the sample, and, therefore, were not the specific goods which were sold, nor the goods which, as such goods sold, were accepted and actually received by the vendee. On the same ground, we think that Nicholson *v.* Bower, 1 E. & E. 172, is even more emphatically overruled by Kibble *v.* Gough, Rickard *v.* Moore, and Page *v.* Morgan, than Smith *v.* Hudson itself is; for in Nicholson *v.* Bower it was affirmatively shown that the goods which had been actually received by the vendee, so that the vendor's lien for the unpaid purchase-money, and his right of *stoppage in transitu*, were gone, were the very goods purchased by the vendee, as they conformed to the sample, and, therefore, were the specific goods which he had approved, assented to, recognized, accepted, as the subject of the purchase. Hence, under the authority of the well-decided cases of Kibble *v.* Gough, Rickard *v.* Moore, and Page *v.* Morgan, had the action in Nicholson *v.* Bower been against the vendee for the price of the

fectly clear as to the actual receipt. As the *transitus* had ended, the goods having arrived at their place of destination, and being in the custody of the railway company, which held them not as carriers, but as warehousemen for the vendee, and subject to his order as to their transportation to a fresh destination, the right of *stoppage in transitu* was gone, and the actual receipt of the statute was unquestionably satisfied.

There was a purchase by the defendant from the plaintiff, in Marshall *v.* Green,[1] of specific, ascertained goods, by verbal contract, for £26, the subject of the purchase being growing trees, which, under the circumstances, were held to be personal chattels. The trees were purchased on February 27; the contract being that they were "to be got away by the vendee as soon as possible." The defendant's servants entered, and cut the trees upon March 2, 3, and 4. After six of the trees had been cut, the plaintiff wrote a letter countermanding the sale. The defendant, nevertheless, felled the remainder of the trees; and, notwithstanding a notice to the contrary from the plaintiff's solicitors, subsequently removed the whole. Before receiving the letter countermanding the sale, the defendant had agreed to sell the tops and stumps to a third person. On these facts, in an

goods, as for goods sold and delivered, after their actual receipt, the goods being in conformity with the sample, and, as such, being the identical goods which he had purchased, approved, recognized, assented to, accepted, as the very subject which he had been purchasing, the judgment must have been against him, as it was against the defendants in the strictly analogous cases of Kibble *v.* Gough and Page *v.* Morgan. It therefore follows that, in Nicholson *v.* Bower, there having been both the acceptance and the actual receipt of the identical goods purchased, the requirements of the statute were satisfied; the *stoppage in transitu* and the vendor's lien for the unpaid purchase-money were gone; the property and possession had both vested in the vendee; the vendor had his right of action for the price as for goods sold and delivered, but could not maintain trover or replevin for goods in which he had ceased to have either the property or the right of possession.

In Conston *v.* Chapman, L. R. 2 Sc. & Div. 250, it was held that the purchaser of goods by sample ought to examine them *without delay;* and if he find they are not conformable to the sample, he may reject them and rescind the contract, giving immediate notice that he does so, and that the goods are at the risk and disposal of the vendor; that though he may reject them if they do not conform to the sample, if he accept them, even though they do not conform to the sample, his power of rejection is gone. Conston *v.* Chapman, L. R. 2 Sc. & Div. 250, was the case of the sale of specific goods by sample. But whether at common law or under the statute, where goods bought by sample have been actually received, but where, from the nature of the goods, considerable delay is necessary before it can be ascertained whether the goods are according to sample or not, and, therefore, whether they are the specific goods purchased or not, the goods may be rejected as not conforming to sample within such period as that fact can be reasonably ascertained. Heilbutt *v.* Hickson, L. R. 7 C. P. 438. And where goods are sold by sample, and the bulk is found by the purchaser on inspection, after actual receipt, not to be equal to sample, the purchaser may reject the goods by giving notice to the vendor that he will not accept them, and that they are at the vendor's risk; and he is not bound to send them back, or offer to send them back, to the vendor, or to place them in neutral custody. Grimoldby *v.* Wells, L. R. 10 C. P. 391; Lucy *v.* Monflet, 5 H. & N. 229.

[1] 1 C. P. Div. 35.

action of trespass, with a count in trover, the verdict was entered for the plaintiff; leave being reserved to enter it for the defendant, on the ground that the contract showed that he had the right to cut down and remove the trees.[1]

Here, the purchase being of specific, ascertained goods, as in Cusack *v.* Robinson,[2] there was no room for question as to the fact of the acceptance of the goods as the particular subject of the contract, although, even here, Coleridge, C. J., again discussed the question as to "whether there was here an acceptance *and* actual receipt of part of the goods." In which, again, as he and so many other of the English judges have so often done before, he treats the term "acceptance" as being virtually synonymous with the "actual receipt" of the statute.[3] But as in the leave reserved there was no question as to the acceptance, so the contention of the plaintiff's counsel was that as there was nothing to devest the vendor's lien there could be no actual receipt;[4] raising no question as to the acceptance. And Brett, J.,

[1] See Smith *v.* Surman, 9 B. & C. 561, stated *supra*, p. 338 *et seq.*, which in most of its facts was a very similar case to Marshall *v.* Green, 1 C. P. Div. 35; but it differed essentially from this latter case in the respect that although in both there was a purchase of specific, ascertained goods, constituting a clear acceptance of the subject of the sale in each case, yet in Smith *v.* Surman the trees were felled by the vendor, and there was no actual receipt of them, as there was in Marshall *v.* Green, where, under the contract, the trees were to be felled and actually were felled by the vendee.

[2] 1 B. & S. 299.

[3] The language of Coleridge, C. J., is: "Is this contract within the 17th section? This depends on whether there was here an acceptance and actual receipt of part of the goods. There have been many decisions on the question, what amounts to such an acceptance and receipt? It was very early determined that an actual manual receipt of the article sold was not necessary, but that a constructive receipt would do. Here six of the trees were cut down before the sale was countermanded, and at a time when it must be taken that that was done with the assent of the seller, and portions were sold. What more could have been done short of actually removing the trees? These were bulky trees that a man could not carry away like a small article. If anything short of actual manual possession could be sufficient all was done that could be done. The defendant immediately cuts down the trees, and converts them into chattels, and deals with them as owner by selling the tops and stumps. In the absence of any decision on the subject, I should have said that if it be once admitted that anything short of actual manual possession could be a sufficient acceptance and receipt, there was amply sufficient to show such an acceptance and receipt here. But we are not without authority on the subject. There have been repeated decisions that where anything has been done on the part of the vendee under such a contract as this, to the whole or part of the goods indicating an intention to deal with the subject-matter as owner in possession, and he is allowed by the vendor so to deal with it, that amounts to an acceptance and receipt within the statute. It has been held with regard to bulky things that the delivery of the *indicia* of title was sufficient. When the purchaser had marked the goods, and left them so marked on the vendor's premises, it was held that there was a sufficient acceptance and receipt. The case of Chaplin *v.* Rogers, 1 East, 192, seems to me to be a distinct authority for the view that there was [*sic*] an acceptance and receipt here, the words of the section having received all the fulfilment the subject-matter was capable of." There being no question whatever as to the acceptance in the case, we think the facts showed clearly the actual receipt of the statute of some part of the goods sold and accepted.

[4] As before the sale was countermanded the defendant had felled, and thereby had actually taken possession of six of the trees which he had purchased standing, here was a clear actual receipt of some part of

showing in the case a much clearer appreciation of the law than Coleridge, C. J., conceded the acceptance, and simply considered the question as to whether the acts of the defendant in actually cutting the trees under the authority given to him by the plaintiff and by the plaintiff's tenant, did not, under the statute, constitute an actual receipt of some part of the goods; coming, with the rest of the court, to what we think was unquestionably the sound conclusion that the defendant had, prior to the countermand, taken actual possession of some of the trees, meeting the requirement of the "actual receipt" of the statute of some part of the goods which, by their specific purchase, had been accepted as the very subject of the purchase.[1]

the goods, the whole of which he had accepted as the specific subject of the purchase, and hence the contract under the statute was to be deemed good, and the plaintiff could not of his own mere motion rescind it. The fact that the defendant, under the contract, had the right to get away the trees as soon as possible showed that the vendor had not retained his lien, as he would not in the analogous case of a sale on credit, where the purchaser had the immediate right of possession, as he had in this case. The continuance of the lien, too, as we have already shown, does not affect the question under the statute, where there have been an acceptance and an actual receipt of some part of the goods. There the vendor's lien may continue to attach to the residue, and yet the exception in the statute be complied with so as to make a good contract, which neither of the parties to it can rescind without the consent of the other.

[1] Brett, J., says: "It was not denied in argument that there was an acceptance. The only question, therefore, is, whether there was evidence of a receipt. Though there was an acceptance, there was no actual carrying away of the things from the premises of the seller. The seller was not in actual possession of the land, but I think that makes no difference, and the case must be treated as if he were. The purchaser, by virtue of his license to go on the land, with the acquiescence of the tenant went on the land, and, while the verbal contract was still uncountermanded by the plaintiff, cut down six of the trees, and made a sub-contract for the sale of the tops and stumps. If the sub-sale had stood alone I should have doubted whether it would have been evidence of an actual receipt [See our comments on what we think was the badly-decided case of Baines *v.* Jevons, 7 C. & P. 288, stated *supra*, p. 440, where, we think, there was not the merest *scintilla* of evidence of an actual receipt]; but here he did something to the trees themselves. I should be inclined to say that where there is no actual removal of the things sold, the question depends on this proposition, viz., that when there has been during the existence of the verbal contract, for however short a time, an actual possession of the things sold, and something has been actually done to the things themselves by the buyer which could only properly be done by an absolute owner, there is evidence to go to a jury of an actual receipt of the things. This principle will, I think, be found to be the governing principle in all the decided cases. Thus, for instance, where goods were handed over the counter to the purchaser and marked by him; where casks, though not taken away, have had their spigots cut off by the purchaser, and in other similar cases, there has been an actual possession by the buyer, and something actually done to the goods themselves by him which could only properly be done by an absolute owner. Here, by cutting down the trees, the defendant actually did something to them which, apart from the sale over of the toppings, amounted, in my opinion, to an actual receipt of them. This being so, the words of the 17th section seem to me to have been satisfied."

Where the vendor retains goods in his possession with his lien attached, if his vendee sell the goods, and the original vendor recognize the sale by receiving the subsequent warehouse rent from the sub-vendee, the lien of the original vendor for his unpaid purchase-money is gone. Hurry *v.* Mangles, 1 Camp. 451. But where a sale of goods is made for cash, and the vendor retains possession of the goods as unpaid vendor, his charging warehouse rent to the vendee from the date of the purchase will not of itself amount to a constructive change in the possession so as to deprive the vendor of his lien. Bloxam *v.* Sanders, 4 B. & C. 941. And

In our investigation of this subject, in this and the last preceding Part, we have seen that, within the clause of the seventeenth section of the act we have been considering, where no part of the goods has been accepted and actually received, there is no contract which can be deemed good under the statute, and hence there is, in such case, no contract at all. It, therefore, was suggested as a test, where, to bring the case within the exception of the statute, it is claimed that *the whole of the goods* have been accepted and actually received, that this could not be sustained in any case where the vendor's lien[1] or right

where the vendor, who holds the goods with his lien attached, by receiving warehouse rent from a sub-vendee of part of the goods which have been sold by his vendee, thereby releases his lien on such part of the goods as have been so sold, this does not release the residue of the goods from the vendor's lien for the purchase-money. Miles *v.* Groton, 1 Cr. & M. 504, 513. But where the goods are in the warehouse of the vendor, with his lien attached as unpaid vendor, and on the resale of the goods by the vendee a delivery order is lodged with the original vendor as warehouse-keeper, and he accepts it, and transfers the goods in his warehouse-books to the sub-vendee, he becomes the agent of the sub-vendee, and cannot contest his title, nor claim a lien upon the goods. Pearson *v.* Dawson, E. B. & E. 448. And see *per* Bayley, J., in Hawes *v.* Watson, 2 B. & C. 540; Whitehouse *v.* Frost, 12 East, 614; Swanwick *v.* Sothern, 9 A. & E. 895. So, in Stoveld *v.* Hughes, 14 East, 308, where the vendor assented to the sale of goods by his vendee to a sub-vendee, it was held that the lien as between the vendor and sub-vendee was gone, whatever question there might have been between the original parties.

[1] Maberley *v.* Sheppard, 10 Bing. 99, 101, *per* Tindal, C. J.; Goodall *v.* Skelton, 2 H. Bl. 316; Elmore *v.* Stone, 1 Taunt. 458, 460; Bill *v.* Bament, 9 M. & W. 36; Baldey *v.* Parker, 2 B. & C. 37, 44; Beaumont *v.* Bengeri, 5 C. B. 301; Morton *v.* Tibbett, 15 Q. B. 428, 438; Castle *v.* Sworder, 6 H. & N. 828, reversing s. c. 5 H. & N. 281; Carter *v.* Toussaint, 5 B. & Ald. 855, 859; Rohde *v.* Thwaites, 6 B. & C. 388, 392; Smith *v.* Surman, 9 B. & C. 561, 577; Howe *v.* Palmer, 3 B. & Ald. 321; Hanson *v.* Armitage, 5 B. & Ald. 559; Tempest *v.* Fitzgerald, 3 B. & Ald. 680; Proctor *v.* Jones, 2 C. & P. 532, 535; Phillips *v.* Bistolli, 2 B. & C. 511; Dodsley *v.* Varley, 12 A. & E. 632; 6 Jur. 316; Bushel *v.* Wheeler, 8 Jur. 532, 534; Wright *v.* Percival, 8 L. J. Q. B. 258, 260; Holmes *v.* Hoskins, 9 Ex. 753, 756, *per* Parke, B.; Marvin *v.* Wallis, 6 E. & B. 726, 734, *per* Erle, J.; Chaplin *v.* Rogers, 1 East, 192; Boulter *v.* Arnott, 1 C. & M. 333; Marshall *v.* Green, 1 C. P. Div. 36; Pettitt *v.* Mitchell, 4 M. & G. 819, 841. The case of Hewes *v.* Jordan, 39 Md. 472, in which Alvey, J., delivers the judgment of the court, is one of the most valuable cases we have found on the subject of the acceptance and actual receipt of the statute, either in England or in this country. In this case there was a sale of 3,148 lbs. of butter grease by the respondent to the appellants. The butter grease was, at the time of the bargain, in the cellar of the respondent in packages, and was seen by the agent of the appellants, and both the appellants and their agent could have examined the grease before its removal, but did not do so, except that the agent removed the loose heading of some of the packages, and inspected the top of those packages, but did not use any auger or trier, or in any manner probe into the packages to ascertain the condition of the grease. On the same day of the sale, the appellants received the grease, and, upon further inspecting it, claimed to reject the grease on the ground that it was not merchantable, because of an undue quantity of salt in it; and gave due notice of their objection to the respondent. In an action for the price, the jury were instructed, in accordance with what we have shown to be the fallacious statement of the law, by Lord Campbell, C. J., in Morton *v.* Tibbett, 15 Q. B. 428, that the acceptance and actual receipt of the statute need not be absolute and unqualified, but might be such as would not preclude the appellants from questioning the quantity or quality of the goods, or in any way disputing that the contract had been fully performed by the respondent. The jury having found for the respondent (the vendor), the court, on appeal, held that there was evidence from which the jury might have found both acceptance and actual receipt of the goods within the meaning of the statute (Kershaw *v.* Ogden,

of *stoppage in transitu* was not gone;[1] where the vendor could not

3 H. & C. 717); but that the direction of the court below to the jury was wrong, and tended to mislead them; and ordered a new trial. We make the following selections from the judgment of Alvey, J.: "From the plain meaning of the terms of the statute itself, independent of all authority, the concurrence of two distinct acts on the part of the vendee would seem to be required. He must accept, and he must actually receive part of the goods in order to render the contract binding on him. There may be an actual receipt without any acceptance, and there may be an acceptance without any receipt. But if both these acts concur, with the intention of the parties that the vendee shall take possession of the goods under the contract as owner, then the latter must be taken as having made a final election to accept the goods, or such part of them as he may have actually received as his property, and, at the same time, assent to their being such as will ratify the contract; and acceptance and receipt being thus complete, to bind the contract, the vendee cannot afterwards withdraw his acceptance and reject the goods, except it be on the ground of fraud.

"Opposed to the general proposition that there is no such actual acceptance as the statute contemplates, so long as the vendee continues to have the right to object to the quantity or quality of the goods, we have the judgment of Lord Campbell, in the case of Morton *v.* Tibbett, 15 Q. B. 428. . . . Lord Campbell, in the course of his very elaborate judgment, maintained, what the case did not really require to be maintained, that the acceptance contemplated by the statute is, in all cases, to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and not a subsequent act; that there may be an acceptance and receipt within the statute without the purchaser having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract; and that the acceptance to let in parol evidence of the contract is a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.

"Now, it may be readily conceded, that the question, whether there has been, in any particular case, such acceptance and actual receipt of a part of the goods as will bind the contract, may be quite different and distinct from that as to whether the contract has been fulfilled in respect to quantity and quality of the *residue* of the goods, where the vendee has had no opportunity of examining the goods that may be offered in fulfilment of the contract, and where he has done nothing to preclude himself from the exercise of the right to object that they do not correspond with those actually received by him. The effect of the acceptance and actual receipt of part of the goods, however small, is to prove the contract of sale, and it is not inconsistent with this that the vendee should have the right, with respect to the *residue* of the goods when offered in fulfilment of the contract, to object that they are not such in quantity and quality as

[1] Bushel *v.* Wheeler, 8 Jur. 532; Baldey *v.* Parker, 2 B. & C. 37, 44; Norman *v.* Phillips, 14 M. & W. 277; Farina *v.* Howe, 16 M. & W. 119; Morton *v.* Tibbetts, 15 Q. B. 428; Meredith *v.* Meigh, 2 E. & B. 364; Nicholson *v.* Bower, 1 E. & E. 172, 175; Smith *v.* Hudson, 6 B. & S. 431; Harman *v.* Anderson, 2 Camp. 343; Lucas *v.* Dorrien, 7 Taunt. 278; Hurry *v.* Mangles, 1 Camp. 452; Heinckey *v.* Earle, 6 E. & B. 410; Craven *v.* Ryder, 6 Taunt. 443. As to the delivery which is sufficient to defeat the right of *stoppage in transitu*, see Hammond *v.* Anderson, 1 B. & P. N. R. 69; Scott *v.* Pettit, 3 B. & P. 469; Whitehouse *v.* Frost, 12 East, 614; Stoveld *v.* Hughes, 14 East, 308; Harman *v.* Anderson, 2 Camp. 242; Withers *v.* Lyss, 4 Camp. 237; Shear *v.* Travers, *Ib.* 251; Lucas *v.* Dorrein, 1 B. Moore, 29; Green *v.* Haythorne, 1 Stark. 447; Hawes *v.* Watson, 2 B. & C. 540. As to the carrier, *qua* carrier, not being the agent of the vendee to actually receive the goods, to put an end to the *stoppage in transitu*, and to absolutely vest the possession of the goods in the vendee to satisfy the actual receipt of the statute, see Astey *v.* Emery, 4 M. & S. 262; Hanson *v.* Armitage, 5 B. & Ald. 537; Johnson *v.* Dodgson, 2 M. & W. 656; Norman *v.* Phillips, 14 M. & W. 277; Hunt *v.* Hecht, 8 Ex. 814; Acebal *v.* Levy, 10 Bing. 376; Meredith *v.* Meig, 2 E. & B. 370; Cusack *v.* Robinson, 1 B. & S. 299; Hart *v.* Bush, E. B. & E. 494; Smith *v.* Hudson, 6 B. & S. 431; Bushel *v.* Wheeler, 8 Jur. 532; Hart *v.* Sattley, 3 Camp. 528; Bill *v.* Bament, 9 M. & W. 36; Howe *v.* Palmer, 3 B. & Ald. 321; Bentell *v.* Burn, 3 B. & C. 423; Zwinger *v.* Samuda, 7 Taunt. 265; Gorman *v.* Bodly, 2 C. & K. 145; Morton *v.* Tibbett, 15 Q. B. 428; Coombs *v.* The Bristol & Exeter Ry. Co., 3 H. & N. 510; Currie *v.* Anderson, 2 E. & E. 592; Nicholson *v.* Bower, 1 E. & E. 172.

sustain an action for the goods as for goods sold and delivered,[1] and where the vendee could not maintain trover for their wrongful withholding.[2]

But it is quite clear that the same principle does not apply, where there have been an acceptance and an actual receipt of some part

the contract requires; and in such case, the question in dispute can only be determined by the aid of parol evidence. But in all cases where the goods bargained for have been accepted and actually received by the vendee, he is thereby precluded, in the absence of fraud, from objecting that they do not correspond with the contract. Any other construction would certainly tend to let in all the evils that were intended to be excluded by the particular provision of the statute; and hence, the proposition maintained by Lord Campbell in Morton *v.* Tibbett, that there may be an acceptance and receipt within the statute without the purchaser having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract, has found but partial favor with the judges of Westminster Hall. Some of those judges have openly expressed their dissent from it; and while it may be taken as the established construction of the statute by the Queen's Bench, it has failed to receive the sanction of the Court of Exchequer. Hunt *v.* Hecht, 8 Ex. 814; Coombs *v.* Bristol & Exeter Ry. Co., 3 H. & N. 510. See also the recent case of Smith *v.* Hudson, 6 B. & S. 431. As we have seen, the act of acceptance is not confined to any particular order of time in reference to the actual receipt of the goods. On the contrary, acceptance may precede, as in cases where the vendee has inspected and approved the specific goods purchased, as well as be contemporaneous with, or subsequent to, the actual receipt of the goods. This was decided in the case of Cusack *v.* Robinson, 1 B. & S. 299. And, in the present case, we think there was evidence from which the jury might have found both acceptance and actual receipt of the goods within the meaning of the statute. Kershaw *v.* Ogden, 3 H. & C. 717." And the Court of Appeal held, that the judge on the trial, instead of instructing the jury as he did, in accordance with the erroneous *obiter dictum* of Lord Campbell, C. J., in Morton *v.* Tibbett, 15 Q. B. 428, should have left the question to the jury whether there had been an acceptance and actual receipt by the vendees of the butter-grease with an intention of taking possession as owners, the facts of the case showing such an acceptance and actual receipt as would sustain the affirmative of such finding by the jury on the question being submitted to them. See Clarke *v.* Marriott, 9 Gill, 331; Jones *v.* Mechanics' Bank, 29 Md. 293.

[1] Goodhall *v.* Skelton, 2 H. Bl. 316; Hodgson *v.* Le Bret, 1 Camp. 233; Anderson *v.* Scott, *Ib.* 235, n.; Wright *v.* Percival, 8 L. J. N. S. Q. B. 258; Baines *v.* Jevons, 7 C. & P. 288; Johnson *v.* Dodgson, 2 M. & W. 653; Farina *v.* Howe, 16 M. & W. 119; Coombes *v.* The Bristol & Exeter Ry. Co., 3 H. & N. 510; Swain *v.* Shepherd, 1 M. & Rob. 223; Coats *v.* Chaplin, 3 Q. B. 483; Turley *v.* Bates, 2 H. & C. 200; Meredith *v.* Meig, 2 E. & B. 364; Simmons *v.* Swift, 5 B. & C. 857; Cusack *v.* Robinson, 1 B. & S. 299; Smith *v.* Hudson, 6 B. & S. 431; Kershaw *v.* Ogden, 3 H. & C. 717.

[2] Proctor *v.* Jones, 2 C. & P. 532, 535. In this case Best, C. J., says: "It cannot be said in the present case that the defendant actually received the goods. Could the vendee maintain trover if the goods were not delivered? Certainly he could not, for the seller would have a lien on them for the price, as there was no stipulation as to payment at a future time. It is the intention of the statute that there should be as complete a delivery as can be according to the nature of the article." And see Simmons *v.* Swift, 5 B. & C. 857; Goodall *v.* Skelton, 2 H. Bl. 316, and cases in the next preceding notes. To effect an acceptance and actual receipt of the whole of the goods to satisfy the statute of frauds, the goods must necessarily, by the very facts of their acceptance and actual receipt, be specific, ascertained goods. So, as trover can only be maintained for specific goods, unless their individuality can be ascertained the action of trover cannot be resorted to in respect of them, and their identity not being known, the stopping of them *in transitu* is not in the nature of things possible. This usually occurs where, consistently with the contract, any commodities of the vendor answering a particular description might be supplied; and in these cases the vendee, though he were solvent, could not maintain trover. The principle of these cases is clearly developed in the judgment of the court in Austen *v.* Craven, 4 Taunt. 644; White *v.* Wilks, 5 Taunt. 176. See also Busk *v.* Davis, 2 M. & S. 397; Wallace *v.* Breeds, 13 East, 522; Hawes *v.* Watson, Ry. & M. 6, 10, n.

of the goods only, and where the claim is not that there have been an acceptance and an actual receipt, — a transmission of the property and of the actual possession in and of the whole of the goods. Where there have been an acceptance and an actual receipt of some part of the goods, although the lien and the right of *stoppage in transitu* may continue as to the residue, there is a contract deemed good which can be enforced by either vendor or vendee. But, as in the case of non-specific, non-ascertained goods, as there may not be even the passage of the property to the vendee, much less the transfer of the possession to him, in the residue of the goods which have not been actually received, it is obvious that the continuance of the lien, or the right of *stoppage in transitu*, or the right to bring an action for goods sold and delivered, is, in such case, no more a test as to whether the requirements of the section have been met, than it would be where the verbal contract has been made binding by a note or memorandum in writing, or by the payment of earnest-money or a part payment. Consequently, where either the lien or the right of *stoppage in transitu* can be enforced, or an action lie for the goods as for goods sold and delivered, where the contract is made good by the note or memorandum in writing, or by the part payment, it can equally as well be so where it is made good by the acceptance and actual receipt of a part of the goods; there being just the same transfer of the property in the goods, and no greater transfer of the actual possession of the goods — except in the one case of the part actually received — in the one case than in either of the others. Then, while it is true, that an action for goods sold and delivered will lie in every case where there has been an actual transfer of the property and the actual possession in and of the whole of the goods, to the vendee; and where such action will not lie, it is then conclusive that there have not been the acceptance and the actual receipt of the whole of the goods to satisfy the statute; yet the converse of this is not also true, *i. e.*, it is not true that the action will not lie as for goods sold and delivered unless there have been an acceptance and an actual receipt of the whole of the goods. For there are cases which hold that the action for goods sold and delivered will lie, where there is a good contract for the sale of goods so that the property in them has passed to the vendee by virtue of the contract, though the right of *stoppage in transitu* continues. It therefore follows that in all cases where the action for goods sold and delivered will lie on a contract for the sale of goods where the contract is made good by the note or memorandum in writing, or the part payment of the purchase-money, it will also necessarily lie where it is made good

by the acceptance and actual receipt of a part of the goods; the contract being equally as effective to pass the property and to give the right of action for goods sold and delivered to precisely the same extent in the one case as in either of the others.

In our investigation of the subject, we have seen,[1] contrary to the statements of Blackburn and Benjamin, in their works on Sales, that where there have not been an acceptance and an actual receipt of part of the goods by the purchaser, and the reliance is placed on the receipt of the carrier to meet the requirements of the actual receipt of the statute, such a receipt is not the receipt of the vendee, unless the carrier is the vendee's own carrier, to the full extent that the delivery to him is a complete and ultimate delivery to the vendee himself, so that the vendor's right of *stoppage in transitu* is gone. We have seen[2] that this applies not only to the carrier, but to the warehouseman as well. Therefore, where the holding of these is not the actual holding of the vendee, so that the manual or constructive possession of the goods is in him, there is no actual receipt by him to satisfy the statute. And we have also pointed out, that, where the actual receipt of the whole of the accepted goods is relied on to satisfy the statute, there, as the vendee can maintain an action of trover, so the vendor can always sustain an action for goods sold and delivered; and, unless he can sustain such action, then there have not been the acceptance and the actual receipt of the goods by the vendee to satisfy the statute. But, the converse of this is not necessarily true. At common law, when there is *a complete contract*, it has been held that the delivery of goods to a carrier (though not the carrier of the vendee so that a delivery to him would put an end to the *stoppage in transitu*), for the consignee, is a delivery to the consignee, or vendee, — and this is significant, the delivery may be alike to the consignee whether he be the vendee or not, — so that the property may pass to the consignee; the risk of loss, and therefore, the insurable interest, will be in him, as well as the right of action for injury to the property, or for its recovery. In addition to this, from the loose and improper manner in which, as we have pointed out, the term "accept" is used in many of the English cases, as though it were synonymous with the actual receipt of the statute, we find it repeatedly stated that the carrier is "not the vendee's agent to accept the goods," when, as the cases themselves show, all that was meant by this was that the carrier was not the vendee's agent to actually receive the goods for him to satisfy the statute. It is from these two facts that we find it repeated by nearly all the English and American writers, that "a carrier,

[1] See *supra*, p. 363 *et seq*

[2] *Supra*, p. 367.

although not an agent to accept, is an agent to receive" the goods for the vendee, to satisfy the statute.[1] As we intimated that we would consider the subject in this Part, we refer to some of the authorities on the subject.

The principle of the passage of property by a sale was laid down as long ago as Tr. 8 W. 3 (A. D. 1696), in Knight *v.* Hopper,[2] in an action for the price of 100 pieces of muslins, to be taken away at ten pieces at a time, and paid for as taken away. It was held by Holt, C. J., that the pieces being marked and sealed, the property was altered immediately, and they remained only as a security for the money.[3] And in Godfrey *v.* Furzo[4] (A. D. 1733), it was held that if one send goods to B., beyond sea, to the use of B., and before these goods are paid for B. dies insolvent, the shipper cannot have his goods again. The property, by the shipment, passed to the consignee. And where a tradesman in London, by order of a tradesman in the country, sent goods to the latter, who did not appoint or name the carrier, and the carrier embezzled the goods; Eyre, C. J., held that the trader in the country must stand to the loss.[5] And see Davis *v.* James,[6] where it was claimed that the action against the carrier for the loss of the goods should have been brought in the name of the consignee, as the consignor had parted with his property upon the delivery of the goods to the carrier; but the court held that as there the consignor had agreed with the carrier and was to pay him, the action was properly brought by the consignor, under the agreement, even though the property had passed to the consignee.[7] In Dawes *v.* Peck,[8] Lord Kenyon distinguishes these cases on the ground that the consignors stood in the character of insurers for the safe arrival of the goods; and by Grose, and Le Blanc, JJ., on the ground of special agreements between the consignors and carriers.

In Vale *v.* Bayle[9] (A. D. 1775) the action was for goods sold and delivered. The vendee ordered the goods sent by land carriage, and they were accordingly so sent; there being no other mode of land carriage than that by which they were sent. The goods were lost on the road. The vendee was held liable for the price in this form of action. Lord Mansfield, in delivering judg-

[1] See Blackburn on Sales, 2d ed., 17, 22, and the other authorities cited *ante*, p. 363, n. 4.

[2] Cas. temp. Holt, 8.

[3] S. C. Skinner, 647.

[4] 3 P. Wms. 185.

[5] N. P. case at Shrewsbury Assizes, cited 3 P. Wms. 185. And see Snee *v.* Prescot, 1 Atk. 248; *Ex parte* Dumas, 2 Ves. Sen. 586; Mace *v.* Cadell, Cowp. 233; Copeman *v.* Gallant, 1 P. Wms. 314.

[6] 5 Burr. 2680.

[7] And see Moore *v.* Wilson, 1 T. R. 659.

[8] 8 T. R. 330, 533.

[9] 1 Cowp. 294.

ment, said: "If a vendor take upon himself *actually to deliver* the goods to the vendee, he stands to all risks; but if the vendee order a particular mode of conveyance, the vendor is excused. With regard to the question between a vendor and the general creditors of a vendee, as in the case of Birkett *v.* Jenkins,[1] a vendor *before actual possession* by the vendee has a lien upon the goods he sends; and if he can get them *in transitu*, to be sure he has the benefit of that lien. But that has no relation to a transaction, as this is, between vendor and vendee." Here, the "actual possession" referred to, to defeat the lien, which is continued by the *transitus*, is virtually in terms the very "actual receipt" of the statute, and until that "actual" receipt or possession in at least some part of the goods is in the vendee, the statute is not satisfied; even though the action for goods sold and delivered may lie before the goods get into the actual possession or receipt of the vendee, as in Vale *v.* Bayle.[2]

In Dawes *v.* Peck,[3] it was held that if the consignor of goods deliver them to a particular carrier, by order of the consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier for the loss, although he paid for the booking (but not for the carriage) of the goods; the action being in the consignee in whom, by the shipment, the property vests, and upon whom the risk of loss falls. Counsel here contended that as, "*until a delivery in fact*" to the consignee a latent right, to be exercised by the *stoppage in transitu*, remains in the vendor even as against the vendee, the carrier ought not to be permitted to dispute the property in the goods of the person from whom he received them. Here, the "delivery in fact" again represents the actual receipt of the statute; which, as we have seen, is satisfied, when the goods, after the *transitus* has terminated, are in a warehouse, for the vendee, although only constructively then are they in his actual receipt or possession. But, under the complete contract, *dehors* the statute, the property was held, in Dawes *v.* Peck, to have been vested in the consignee, by the delivery of the goods according to his order to the carrier, Grose, J., saying: "By such delivery the goods became the property of the consignee; he was liable to be sued for the value of them; and it is admitted that he might have maintained an action for any loss or injury happening to them by the default of the carrier."[4]

In Dutton *v.* Solomonson,[5] it was held that at common law the delivery of goods by the vendor on behalf of the vendee, to a car-

[1] Easter, 11 Geo. 3, B. R.
[2] 1 Cowp. 294.
[3] 8 T. R. 330.
[4] See Richardson *v.* Dunn, 2 Q. B. 218; Mitchell *v.* Ede, 11 A. & E. 888; Browne *v.* Hare, 3 H. & N. 483.
[5] 3 B. & P. 582.

rier not named by the vendee, is a delivery to the vendee. Lord Alvanley, C. J., in delivering the judgment of the court, sustaining, on this point, an action for goods sold and delivered, said: "The first objection in this case is, that the delivery of the goods to the carrier was no delivery to the person who ordered them, and therefore in that point of view this action was commenced too soon, the writ having been sued out before the arrival of the goods in London. When this point was first mentioned I was surprised, for it appeared to me to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods it is at his risk. The only exception to the purchaser's right over the goods is, that the vendor, in case of the former becoming insolvent, may stop them *in transitu*." This is when there is a complete contract at common law.

In Swain *v.* Shepherd,[1] the distinction is taken by Parke, J., thus: "Generally speaking, where goods of a fair, merchantable quality are forwarded in pursuance of a written order, which binds the person giving the order to receive the goods, the property passes to that person by the delivery to the carrier, and he is the proper person to sue the carrier if the goods are lost;" but where the goods are sent merely for approval, no property passes to the consignee until he receives and adopts the goods. There is in this latter case no more to pass the property in the goods than there is under the Statute of Frauds where there is no memorandum in writing of the contract, no part-payment, and no acceptance and actual receipt of the goods. There is quite an analogy between the two cases.

The doctrine at common law was laid down to the same effect by Lord Brougham, in the House of Lords, in Dunlop *v.* Lambert,[2] thus: "It is no doubt true as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is, after such delivery, the risk of the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance; the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent." But, while it was held

[1] 1 M. & Rob. 223.

[2] 6 Cl. & F. 600.

that this was generally true, yet it was further held, that if the consignor make a special contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods, and the consignor may maintain the action, though those goods may be the property of the consignee; that the question whether the goods are delivered to the carrier at the risk of the consignor or consignee is a question for the jury; and that the delivery of goods to a carrier by a consignor does not necessarily vest the property in them in the consignee. Very clearly it does not where there is no contract under which the property in the goods passes; or where, for any reason, the consignee may refuse to receive the goods.[1]

In Freeman *v.* Birch,[2] Parke, J., said: "In the case of *a complete sale*, the vendor transmits as agent for the vendee."[3]

In Coats *v.* Chaplin[4] the traveller of M., a tradesman residing in London, verbally ordered goods for M., of plaintiff, a manufacturer at Paisley. No order was given as to sending the goods. Plaintiff gave them to defendant, a carrier, directed to M., to be taken to him, and also sent an invoice by post to M., who received it. The goods having been lost by defendant's negligence, and not delivered to M., it was held that the defendant was liable to plaintiff. Wightman, J., said, in this case: "Without going so far as to hold that a consignee can never maintain such an action as this, unless the requisites of the Statute of Frauds have been so satisfied as to render him liable to an action for goods sold and delivered by the consignor, it is enough for us now to say that it has in no case been held that the property passed to the consignee by the consignor's mere delivery to a carrier, the consignee having given no order whatever for the sending."

In the important case of Cusack *v.* Robinson,[5] where there was an acceptance of the goods preceding the actual receipt, so that the question of the actual receipt is separated from the acceptance, it was there held that the receipt by the warehouseman was only a receipt for the vendee to satisfy the statute, because the vendor's lien and right of *stoppage in transitu* had terminated; Lord Blackburn saying: "The intention of the legislature seems to have been that the contract should not be good unless partially

[1] See, further, Brown *v.* Hodgson, 2 Camp. 36; Joseph *v.* Knox, 3 Camp. 320; Freeman *v.* Birch, 1 N. & M. 420; King *v.* Meredith, 2 Camp. 639; Moorsom *v.* Kymer, 2 M. & S. 303; Sergent *v.* Morris, 3 B. & Ald. 277.

[2] 3 Q. B. 492, n.; 1 N. & M. 420.

[3] And see Morgan *v.* Sykes, before Lord Abinger, C. B., affirmed by the Court of Exchequer, cited in Coats *v.* Chaplin, 3 Q. B. 486; Fragano *v.* Long, 4 B. & C. 219; Alexander *v.* Cauber, 1 H. Bl. 20; Hanson *v.* Armitage, 5 B. & Ald. 557; Elmore *v.* Kingscote, 5 B. & C. 583; Hoadley *v.* McLaine, 10 Bing. 482.

[4] 3 Q. B. 483.

[5] 1 B. & S. 299, 310.

executed, and it is partially executed if, after the vendee has finally agreed on the specific articles which he is to take under the contract [which, as we have seen, is the statutory acceptance] the vendor with the vendee's directions parts with the possession, and *puts them under the control of the vendee so as to put a complete end to all the rights of the unpaid vendor as such.*"

And as we have previously pointed out, so, in Cusack *v.* Robinson,[1] Blackburn, J., recognized that in Nicholson *v.* Bower,[2] where it was held that there had been no acceptance by the vendee of the goods, the actual receipt by the vendee was only admitted on the ground that the carriers had ceased to hold the goods as carriers, and held them as warehouseman for the vendee, "under circumstances that might have been held to put an end to the unpaid vendor's rights." And, in the same way, in Smith *v.* Hudson,[3] it was also conceded that the receipt of the carrier was the actual receipt of the vendee under the statute, because the carrier held the goods for the vendee as warehouseman, with the vendor's lien and right of *stoppage in transitu* gone.

So, in Farina *v.* Home,[4] the receipt of the warehouseman was held not to be the actual receipt of the vendee until the former had attorned to the vendee so as to make his holding the actual holding or receipt of the vendee. In this case the actual receipt is severed from the acceptance; so it makes the point clearer.

In Meredith *v.* Meig,[5] Lord Campbell, referring to Bushel *v.* Wheeler,[6] treats that case as deciding that delay by the vendee in advising the vendor that the goods were lying in the carrier's warehouse, might be evidence that "he had received them himself." And in Meredith *v.* Meig,[7] Erle, J., says: "Placing goods on board ship is good evidence of a delivery in support of a count for goods sold and delivered; but that is not the same as the question under the seventeenth section of the Statute of Frauds. I have no doubt that the bill of lading, which is the symbol of the property, may be so received and dealt with as to be equivalent to an actual receipt of the property itself; but in the present case the defendants neither acted, nor led the plaintiff to believe that they acted, as if they had received the goods, or were owners of them."

The case of Coombs *v.* The Bristol & Exeter Railway Co.[8] would be a more valuable one than it is on the question, if it were not for the singular confusion which pervades so many of the English cases, and which we have repeatedly pointed out, in their

[1] 1 B. & S. 299, 307.
[2] 1 E. & E. 172.
[3] 6 B. & S. 431.
[4] 16 M. & W. 119, 123.
[5] 2 E. & B. 364.
[6] 15 Q. B. 442 n.
[7] 2 E. & B. at p. 373.
[8] 3 H. & N. 510.

confounding the acceptance with the actual receipt, as though the latter necessarily involved the former; or as though the acceptance were not, as the statute clearly indicates that it is, an entity, separate and apart from the actual receipt, which is also rendered necessary to make the contract be deemed good. Such confusion is very manifest in the previous case we have examined,[1] where, when the judges use the term "actual receipt," a consideration of the context leaves it doubtful whether they do not thereby mean the acceptance as well as the actual receipt of the statute. The same difficulty exists in Coombs *v.* The Bristol & Exeter Ry. Co.[2] There A. agreed verbally to buy of B. all the whalebone he could procure at a certain price, to be sent by a particular railway; A. agreeing to pay the carriage. Some whalebone to an amount exceeding £10, having been delivered at the railway station by B., consigned to A., and having been duly invoiced to him, was lost in the transit. B. then wrote requesting A. to make a claim against the company. Counsel in this case claimed that as the plaintiff had agreed to take all the whalebone sent the goods were specific goods. We are inclined to think the contention was correct, and that where goods are thus sold, — as all the goods of a certain mark, or all of the goods in a store, or all the whalebone the vendee may be able to procure, — that this makes the goods specific goods, assented to by the vendee as the actual subject of the purchase; and, on their actual receipt, he can no more reject them than he can any other specific goods which he has purchased, and has thus "accepted," as in Cusack *v.* Robinson[3] and the numerous other cases where, having bought ascertained goods, he has actually received them.

From this point of view, Coombs *v.* The Bristol & Exeter Ry. Co.[4] would be another express authority that the receipt of a carrier, in whose hands the goods are subject to *stoppage in transitu*, is not the actual receipt of the vendee required by the statute. But while it is obvious that there is much in the case to show that, as usual, no substantial distinction is made between the acceptance and actual receipt of the statute, there are portions of the case which, *expressis verbis*, are confined to the actual receipt of the statute. Thus, where counsel say: "If goods which have been ordered are delivered to a carrier named by the purchaser, an action for goods sold may be maintained;" Martin, B., answered: "That is so if there is a valid contract, but such delivery is not sufficient to take the case out of the Statute of Frauds." And counsel: "No doubt the delivery to a carrier would have

[1] Meredith *v.* Meig, 2 E. & B. 364.
[2] 3 H. & N. 510.
[3] 1 B. & S. 299.
[4] 3 H. & N. 510.

been a valid delivery to the vendee, if there had been a complete sale and transfer of the property by the contract. In that case the seller would have transmitted the goods as agent for the vendee." So Martin, B., said: "At common law, upon the sale of an ascertained chattel, on delivery to a carrier, the property vested in the vendee. But by the seventeenth section of the Statute of Frauds, 'no contract for the sale of any goods, wares, and merchandises, for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and *actually receive* [the italics are his own] the same, or give something in earnest to bind the bargain, etc., or that some note or memorandum in writing of the said bargain be made and signed,' etc. Therefore, unless one of these things have happened, this contract of sale was not good; not that such a contract is absolutely void, for if either event takes place at any time after the verbal contract, the contract becomes good." And Bramwell, B.: "The only way in which there was a delivery to the defendants by the plaintiff was under the contract of sale. But the contract of sale was invalid, and, therefore, no authority to the defendants to receive the goods for him. But it may be said the contract to carry was made in the name of the plaintiff, and that he might ratify it. I do not think that, in fact, the contract was made in the name of the plaintiff. It is more reasonable to hold that the consignor, when the property is not out of him, does not contract for the consignee." So, Watson, B., distinguishing Dutton *v.* Solomonson,[1] says of it that there "it was said that delivery to a carrier was delivery to the vendee, but in that case there was a perfect contract," leaving the Statute of Frauds out of the question.

The term "actual receipt" of the statute is, we think, exactly equivalent to the "actual delivery," which puts an end to the right of the *stoppage in transitu*, this actual delivery being met where the possession has vested in the vendee, manually, constructively, or symbolically; in either case putting an absolute end to the vendor's lien, and its continuance, the right of *stoppage in transitu*. Thus, in Snee *v.* Prescott,[2] Lord Hardwicke says: "If goods were delivered to a carrier to be conveyed to A., and while the carrier was upon the road, and *before actual delivery* to A. by the carrier, the consignor hears that A., his consignee, is likely to become a bankrupt, or is actually one, and countermands the delivery, and gets them back into his own possession again, trover will not lie by the assignees of A.; because the goods while they were *in transitu* might be countermanded." This was approved in Ellis

[1] 3 B. & P. 582. [2] 1 Atk. 248.

v. Hunt,[1] Lord Kenyon, C. J., there saying: "As to the necessity of the goods coming to the corporal touch of the bankrupt, that is merely a figurative expression, and has never been literally adhered to. For there may be *an actual delivery* of the goods without the bankrupt's seeing them, — as a delivery of the key of the vendor's warehouse to the purchaser." And Ashurst, J.: "The general rule is that the consignor has a right to stop the goods, if he can, before they get into the *actual possession* of the bankrupt."

And Lord Wensleydale (Parke, J.), in Dixon *v.* Yates:[2] "If the vendors had parted with the actual possession, and the goods had remained in the hands of a carrier they would have been entitled to stop them *in transitu*, unless the sub-purchasers from the vendee *had taken actual possession.*" So, in Townley *v.* Crump,[3] where a sale of goods was made, but the possession remained in the vendor, a delivery order being handed to the vendee, but no transfer of the goods having been made on the warehouse books of the vendor, Lord Abinger, C. B., held that no sufficient delivery was shown to devest the lien of the vendors. And, treating the delivery order as only equivalent to the giving of an invoice or bill of lading, said, that that "does not take away the right to stop *in transitu*, if there has been *no actual delivery* of the goods."[4]

We therefore conclude that though there is no actual receipt by the vendee, under the statute, of the whole of the goods, so long as the vendor's lien or his right of *stoppage in transitu* attaches to the whole of the goods, and that, in such case, the vendor cannot maintain an action for goods sold and delivered, nor the vendee maintain trover for them; yet, where the requirements of the statute have been met, either by the acceptance and actual receipt of part of the goods, by the memorandum of the contract in writing, or by a part payment of the purchase-money, and there is thus a complete contract, the action for goods sold and delivered may be as at common law where there has been a delivery of the goods to a carrier, even though the right of *stoppage in transitu* may continue.

Campbell, who, in his work on Sales, also reaches this conclusion, does so, on the ground[5] that the term "actual" in the statute is used in contradistinction to the term "constructive." We do not concur in this view, which we think results from the want

[1] 3 T. R. 464.
[2] 5 B. & Ad. at p. 341.
[3] 4 A. & E. 58, 60.
[4] In a note to the fourth American edition of Benj. on Sales, § 186, it is said that this was a good receipt to satisfy the statute. On the contrary, while there was here the acceptance of the goods by the vendee, the very "actual receipt" which is required by the statute was held to be wanting, the goods not having been actually transferred or delivered to the vendee.
[5] See Campbell on Sales, p. 186.

of stress in the distinction between the acceptance and the actual receipt of the statute. By the acceptance at common law; that is, by the assenting, the recognizing, the taking to the specific goods as the subject of the contract, the property in the goods passed to the vendee. But, in addition to this acceptance, the statute requires an actual receipt as well; that is, an actual transmission of the possession from the vendor to the vendee, so that both property and possession absolutely, by the acceptance and the actual receipt, vest in the vendee; as, by an actual delivery to the vendee of accepted goods, the very *transitus* of the goods is terminated, and the vendor's possession and lien are, on the goods actually delivered, actually extinguished. But the actual delivery, where this result is accomplished, equally amounts to an actual receipt, as it did at common law, whether such actual receipt be manual, constructive, or symbolical. Campbell saw this in the case of the constructive receipt by a warehouseman, and tries, we think not successfully, to treat this as an exceptional case of actual receipt. But, outside of that, there are numerous cases, many of which we cite in the next succeeding lengthy note, where the goods remain in the possession of the vendee, but as he holds them not as owner, but as custodian or bailee for the vendee, with his lien as unpaid vendor gone, and his right to sue as for goods sold and delivered attaching, his possession is the constructive possession of the vendee, and meets the requirements of the actual receipt of the statute. Hence, we conclude, to satisfy the requirements of the actual receipt, and its correlative, actual delivery, as the vendor is not the agent of the vendee to actually receive the goods, and can only hold the goods for the vendee when his position as vendor, in respect to the goods which he has actually delivered, is gone, so that, on them, he has lost his lien as unpaid vendor; so the vendor's carrier is not the vendee's agent to actually receive the goods within the meaning of the statute; and, therefore, as long as he holds the goods with the vendor's lien or right of *stoppage in transitu* attaching, his receipt is not that of the vendee, and the actual receipt of the statute, with its corresponding actual delivery to the vendee, is wanting.

The fundamental error which was made by the Court of Queen's Bench in Bushel *v.* Wheeler,[1] was in their ignoring the actual receipt of the statute, as though an acceptance alone was all that was necessary to make the contract be deemed good, although in their strange contradictions the acceptance itself was to be ignored when there was an actual receipt. Thus, Lord Denman there, ignoring the actual receipt, or implying that where there is

[1] 8 Jur. 532.

an "actual manual receiving," there is necessarily an acceptance, says: "When the contract is not in writing, the question whether there has been *an acceptance* must be a question of evidence, varying very much according to the particular circumstances of each case. The purchaser may depute another person to exercise a judgment for him as to the quality of the goods, or he may rely upon the judgment and integrity of the manufacturer from whom he orders the goods. In these cases, it seems to me, there may certainly be an acceptance within the statute, without an actual manual receiving." Williams, J., is even worse. He mixes the terms in the most inextricable manner, thus: "The moment it is held that *manual acceptance* by the buyer is not necessary to satisfy the strong language of the statute, it follows that a *constructive acceptance* is sufficient. The larger in bulk the goods are, and therefore, in general, the greater the value of the goods in question, the more impossible is an *actual receipt* of them by the buyer himself; and, therefore, in the nature of things, a *constructive receipt* must be considered as satisfying the statute. If, then, there may be a *constructive receipt*, the question must be left to the jury. It would be absurd to attempt to lay down any general rule as to what amounts *to an acceptance;* it must be submitted to the jury in each particular case, has there or has there not been *an actual acceptance?*" And, as we have pointed out,[1] although the jury had expressly found that there had been no acceptance, a new trial was ordered for a further finding by them on the same question; the point as to the actual receipt being in terms ignored, although there seems to have been no evidence in the case of any delivery having been made to the vendee, or of any actual receipt by him.

But we think we have demonstrated in our very full examination of these important questions, in this and in the next preceding Part, that the acceptance of the statute is one thing; viz., an act of the mind, in accepting, approving, selecting, recognizing, taking to of the goods purchased as the very subject of the contract; and that the actual receipt of the goods, which is also required by the statute, and which is the actual transmission of the possession of the goods or of such of them as have been actually delivered, from the vendor to the vendee, either manually, constructively, or symbolically — but so actually, and so effectually, as that they are absolutely in the possession of the vendee by himself or his bailee, with the vendor's lien or his right of *stoppage in transitu*, gone — is quite another; and that both the acceptance and the actual receipt are necessary as to the goods which have

[1] *Supra*, p. 355.

been actually delivered and actually received, in order to supply the evidence of the "good" contract under the statute.

These points being, we think, established, and thinking it is *not* "absurd to attempt to lay down any general rule as to what amounts to an acceptance;" but that, in order to relieve the cases from the mass of confusion in which the absence of such an attempt has involved them, it was necessary to make that attempt, which we have done, and we trust successfully; it now remains to make such application as we can of these principles to the decided cases. This could be more satisfactorily done if the cases had generally been decided, as they have not been, upon any consistent, logical principle.

We conclude then, that where there is the actual receipt by the vendee of the goods sold, or of some part of them, there is also the sufficient acceptance of them to satisfy the statute, when

1. The goods are specific goods, ascertained, selected, recognized; and specifically, by such ascertaining, selecting, recognizing, are accepted and taken to as the very subject of the purchase.[1]

[1] The leading case fixing this principle is Cusack *v.* Robinson, 1 B. & S. 299. But since that important and thoroughly well-decided case has fixed the principle that the acceptance is an independent entity, which in no wise depends upon the actual receipt of the statute, which is also required to make the contract be deemed good; and that the acceptance may precede, be contemporaneous with, or follow the actual receipt, the case has fixed the doctrine as applicable to the statute, as it was at common law before the statute was enacted, — that the selling of specific goods for a specific price (*per* Holroyd, J., in Baldey *v.* Parker, 2 B. & C. 37, 44) itself is an acceptance of the goods, passing the property in them to the vendee. And when, upon such a sale, involving such an acceptance, the vendor so parts with the possession of the goods that he parts with his lien, and the possession absolutely vests in the vendee, the statute is satisfied. For "the statute contemplates such a parting with the possession; and, therefore, as long as the seller preserves his control over the goods so as to retain his lien [on all the goods sold], he prevents the vendee from . . . receiving them *as his own* within the meaning of the statute." *Ibid.* On the principle as to acceptance which we deduce from Cusack *v.* Robinson, 1 B. & S. 299, all of the following cases rank themselves: Chaplin *v.* Rogers, 1 East, 192; Hodgson *v.* Le Bret, 1 Camp. 233; Elmore *v.* Stone, 1 Taunt. 458; Astey *v.* Emery, 4 M. & S. 262; Blenkinsop *v.* Clayton, 1 Taunt. 397; Tempest *v.* Fitzgerald, 3 B. & Ald. 680; Carter *v.* Touissaint, 5 B. & Ald. 855; Price *v.* Lea, 1 B. & C. 156; Baldey *v.* Parker, 2 B. & C. 37; Procter *v.* Jones, 2 C. & P. 532; Smith *v.* Surman, 9 B. & C. 561; Maberley *v.* Sheppard, 10 Bing. 99; Elliott *v.* Pybus, 10 Bing. 512; Baines *v.* Jevons, 7 C. & P. 288; Boulter *v.* Arnott, 1 Cr. & M. 333; Goodall *v.* Skelton, 2 H. Bl. 316; Simmons *v.* Swift, 5 B. & C. 857, 864; Wright *v.* Percival, 8 L. J. N. S. Q. B. 258; Harris *v.* Matthews, 3 Jur. 1192; Dodsley *v.* Varley, 12 A. & E. 632; Edan *v.* Dudfield, 1 Q. B. 551; Farina *v.* Home, 16 M. & W. 119; Saunders *v.* Topp, 4 Ex. 390; Holmes *v.* Hoskins, 9 Ex. 753; Bigg *v.* Whisking, 14 C. B. 195; Tomkinson *v.* Staight, 17 C. B. 697; Marvin *v.* Wallis, 6 E. & B. 726; Currie *v.* Anderson, 2 E. & E. 592; Simmonds *v.* Humble, 13 C. B. N. S. 258; Kershaw *v.* Ogden, 3 H. & C. 717; Heilbutt *v.* Hickson, L. R. 7 C. P. 438, 449; Marshall *v.* Green, 1 C. P. Div. 35, 43. The principles as to acceptance at common law by the purchase of specific goods, in thus selecting, recognizing, approving, accepting, the goods, which governed the framers of the statute of frauds, and with reference to which they obviously used the term "accept" of the statute, are well laid down by Bovill, C. J., in Heilbutt *v.* Hickson, L. R. 7 C. P. 438, 449, fully quoted by us, *supra*, p. 419. And see, on the same subject, Alexander *v.* Gardner, 1 Bing. (N. C.) 671; Aldridge *v.* Johnson,

2. That they are specific goods, and accepted as such as the subject of the contract, when, by description, the particular goods are identified, recognized, assented to, and approved; and, therefore, they cannot, after their actual receipt, be rejected, if they are the very goods which, by their description, have been made the approved, accepted, recognized subject of the contract.[1]

7 E. & B. 885; Langton *v.* Higgins, 4 H. & N. 402; Wait *v.* Baker, 2 Ex. 1; Brown *v.* Hare, 4 H. & N. 822; Tregelles *v.* Sewell, 7 H. & N. 574; Behn *v.* Burness, 3 B. & S. at p. 756, *per* Williams, J. In Dixon *v.* Yates, 5 B. & Ad. 313, 340, Lord Wensleydale (Parke, J.) said: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned in Failey *v.* Culverwell, 2 Mann. & Ry. 566, in a note by the reporters; but I apprehend the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel is equivalent to his accepting possession. The effect of contract, therefore, is to vest the property in the bargainee."

[1] Thus, in Kibble *v.* Gough, 38 L. T. N. S. 204, the contract was to buy all the barley of the year's growth. It was held (see *per* Cotton, L. J. at p. 206) that this related to a thing certain and specified, and, on its actual receipt, it being the very barley that was purchased, it could not be rejected. So, in analogy to this, it was held in the Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481, where the defendant agreed to accept a specific number of shares afterwards allotted to him, that this was a sufficient acceptance of the shares to satisfy the statute, which required the specific attestation by the purchaser of his acceptance of the shares, inasmuch as the purchaser did get the very thing for which he had asked, and of which he had by anticipation testified his acceptance. So we think there was a clear acceptance of the whalebone in Coombs *v.* The Bristol & Exeter Ry. Co., 3 H. & N. 510, as that was the very subject of the purchase, and, by its purchase, was recognized, approved, assented to, accepted, as the very subject of the purchase. And, we think, that had the receipt of the carrier been there the actual receipt of the vendee, both the statute would have been satisfied and the property and possession in and of the goods woud have been in the vendee as the specific subject of the purchase. So we think, where there was, as in Hart *v.* Bush, E. B. & E. 494, the purchase at a specific price of a designated kind of brandy, that this was an acceptance of the brandy as the subject of the purchase; and had the vendee actually received the subject of his purchase, as in Kibble *v.* Gough, 38 L. T. N. S. 204, and in the Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481, that then, on the actual receipt of the brandy, he could not have rejected it, as it was the very subject which he had recognized, approved, and assented to as the article he was buying at the agreed price. But the receipt of the carrier was not, as was contended in this case, the recipt of the buyer, and, therefore, the statute was not satisfied. Indeed, Lord Campbell, in the case, treats the matter as one only as to whether there was a receipt or not, thereby either tacitly conceding the acceptance of the goods by the vendee or else entirely ignoring its necessity. So, we think, as there was an actual receipt in Hunt *v.* Hecht, 8 Ex. 814, but not of the goods which were purchased, that had the bones which were to have been selected from the pile been selected, delivered, and actually received, the vendee could not have rejected them, as they would have been the very subject which he had recognized, assented to, approved, accepted, as the subject of his purchase; and, therefore, after their actual receipt, he could not have rejected them had they been the actual goods to which he had assented and "accepted" as the subject of the purchase. We therefore think that where, in Curtis *v.* Pugh, 10 Q. B. 111, there was a purchase of a quantity of Cox's best glue, which was actually received by the vendee, and which the jury found was Cox's best glue, that the vendee could not thereafter reject it on the ground that it was not Cox's best glue, when, by his very purchase, he rec-

3. That they are accepted as the subject of the contract within the meaning of the statute, when they have been purchased by sample, whether the sample has been actually received as a part of the very bulk of the goods or not; and, after the actual receipt of the goods so purchased, and so, as per sample, recognized, assented to, adopted, taken to, accepted, as the very subject of the purchase, they cannot be rejected if they conform to the sample, and, therefore, are the very goods which have been approved, assented to, accepted, as the very subject of the purchase. But, if they do not conform to the sample, and, therefore, are not the goods which have been accepted as the subject of the purchase, they may after their actual receipt, be rejected.[1]

ognized, assented to, approved, accepted, and took to Cox's best glue as the very subject of the purchase, and, therefore, on its actual receipt, could not reject it, as he had got exactly the goods to which he had assented as the very subject of the purchase; as did the vendee in Cusack *v.* Robinson, 1 B. & S. 299, and in the Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 481. We think the *rationale* of Kibble *v.* Gough, 38 L. T. N. S. 204; Rickard *v.* Moore, 38 L. T. N. S. 841, and Page *v.* Morgan, 15 Q. B. Div. 228, fully sustains this view.

[1] We have already pointed out (see *supra*, p. 465 *et seq.*) that the late cases of Kibble *v.* Gough, 38 L. T. N. S. 204, Rickard *v.* Moore, 38 L. T. N. S. 841, and Page *v.* Morgan, 15 Q. B. Div. 228, are only consistent with each other, and can only be sustained on this ground, which, we think, is entirely sound. The fallacy of some of the judges in these cases (Cotton, L. J., in Kibble *v.* Gough, 38 L. T. N. S. at p. 206; Brett, M. R., in Page *v.* Morgan, 15 Q. B. Div. at p. 230), in the adoption of Lord Campbell's *obiter dictum* in Morton *v.* Tibbett, 15 Q. B. 428, that there can be an acceptance which is not an acceptance, or an acceptance under the statute which does not preclude its opposite, a rejection as well, is transparent. What has misled them into this fallacy sustains the position which we have above formulated. Where there is a sale of specific, ascertained goods, or a sale of goods, which, whether by description or as a sale by sample, are specifically designated and distinguished as the subject of the purchase, so as to be the designated, recognized, assented to, approved, subject of the contract of sale, there is then an acceptance of the subject of the sale, *but of that alone*. Hence, if goods are actually received, as in Hunt *v.* Hecht, 8 Ex. 814, in Rickard *v.* Moore, 38 L. T. N. S. 841, and probably in Barnett *v.* Farley, 11 L. T. N. S. 107, which are not the very goods contracted for, as they have not been the goods which have been accepted, they may be rejected. They may be actually received and rejected, because they have not been accepted. But the same goods cannot both be accepted *and* rejected, although they must, to satisfy the statute, be both accepted and actually received. Hence, when the acceptance of the statute is ignored, or treated as being entirely involved in the actual receipt, when they say the goods can both be accepted and rejected, they really mean little or nothing more than that the goods can be actually received and rejected; not that they can both be accepted and its very opposite, rejected. Hence, in Kibble *v.* Gough, 38 L. T. N. S. 204, and in Page *v.* Morgan, 15 Q. B. Div. 228, it was held, that the goods, having been actually received, and conforming with the sample, and, therefore, being the very goods which were purchased, assented to, recognized, adopted, accepted, as the very subject of the purchase, could not be rejected. But, in Rickard *v.* Moore, 38 L. T. N. S. 841, the goods which were actually received, not conforming to the sample, and, therefore, not being the goods which had been purchased, assented to, recognized, accepted, as the very subject of such purchase, could be rejected, notwithstanding their actual receipt. They could be rejected because they were not the goods which had been purchased, and, therefore, never had been recognized as the subject of the contract, or accepted. See also the following cases of sales by sample, and where the right to reject the goods or not is governed by the principles really decided by the three late cases we have examined: Hinde *v.* Whitehouse, 7 East, 558; Klintz *v.* Surry, 5 Esp. 267; Cooper *v.* Elston, 7 T. R. 14; Talver *v.* West, Holt, 178; Howe *v.* Palmer, 3 B. & Ald. 321; Parker *v.* Palmer, 4 B. & Ald. 387; Johnson *v.*

4. Where, at or after the actual receipt, there has been an express or implied assent to the goods received, as being the subject of the contract, or there have been *laches* on the part of the vendee, or such a dealing with these goods by him as shows that he has taken to them as owner, the requirements of the statutes will be satisfied.[1]

The distinction between an acceptance and the actual receipt of the statute is recognized in the actual holding, in The United States Reflector Co. *v.* Rushton.[2] This was an action for goods sold and delivered. Hence it was necessary that a delivery and actual receipt should be shown. There seems to have been no question raised as to the sufficiency of the evidence as to the delivery and receipt of the goods, and the court held, following Cross *v.* O'Donnell,[3] stated *supra* p. 431, n. 3, that the purchase having been of specific goods, the statute was satisfied. The court thus laid down the law: "If a man goes into a store and selects a particular article of household furniture at a certain price, which he agrees to pay when it is delivered, and the proof is that that particular article was delivered, it is, in the absence of evidence of any objection on his part, to be assumed that there was both a delivery and acceptance of the article within the meaning of the statute."[4] See also Outwater *v.* Dodge,[5] where it was held, although, as in so many of the English cases, not clearly distinguishing the acceptance and the actual receipt as independent entities, that the "selection of the goods and designation of the receiver may amount to an acceptance, with which the actual delivery, though posterior in point of time, might be coupled by relation, so as to put the whole transaction out of the operation of the statute."[6]

Dodgson, 2 M. & W. 653; Walker *v.* Nussey, 16 M. & W. 302; Morton *v.* Tibbett, 15 Q. B. 428; Gardner *v.* Grout, 2 C. B. N. S. 340; Simonds *v.* Fisher, 2 C. B. N. S. 342; Gilliat *v.* Roberts, 19 L. J. N. S. Ex. 410; Grimoldsby *v.* Wells, L. R. 10 C. P. 391. But see Nicholson *v.* Bower, 1 E. & E. 172, and Smith *v.* Hudson, 6 B. & S. 431, fully examined by us, *supra*, p. 415 *et seq.*, which we think are very doubtful cases, and scarcely sustainable in view of the *ratio decidendi* of the later cases of Kibble *v.* Gough, 38 L. T. N. S. 204; Rickard *v.* Moore, 38 L. T. N. S. 841, and Page *v.* Morgan, 15 Q. B. Div. 228.

[1] Edan *v.* Dudfield, 1 Q. B. 551; Morton *v.* Tibbett, 15 Q. B. 428; Rohde *v.* Thwaites, 6 B. & C. 388; Chapman *v.* Morton, 11 M. & W. 534; Lillywhite *v.* Devereux, 15 M. & W. 285; Godts *v.* Rose, 17 C. B. 229, 237.

[2] 7 Daly, 410.

[3] 44 N. Y. 661.

[4] The United States Reflector Co. *v.* Rushton, 7 Daly, 410, 416; Daly, C. J., delivering the judgment.

[5] 6 Wend. 397, 402.

[6] In Garfield *v.* Paris, 96 U. S. 557, it was held that the acceptance and receipt of goods to satisfy the statute of frauds might be constructive, and that the acceptance and receipt of labels of bottles of spirituous liquors, which the jury found added to the price of the liquors, and formed part of the price, were an acceptance and receipt of the goods within the statute.

A verbal agreement was made between the plaintiff and defendant in Hinchman *v.* Lincoln, 124 U. S. 38 (decided Jan. 9, 1888), for the sale by the plaintiff to the defendant of certain stocks and bonds. The plaintiff delivered the stocks and bonds to a third party, who gave a receipt

In this,[1] there would seem to be some appreciation of the distinction existing between the acceptance and the actual receipt of

for them stating that they were to be delivered to the defendant "when he fulfils his contract [with the plaintiff] to purchase said stocks for $18,000." This receipt, with some verbal statements of the defendant, was mainly relied on as satisfying the New York Statute of Frauds. In an action to recover the price of the stocks and bonds, the court refused to direct the jury that, as the agreement was not in writing, there had been no receipt and acceptance of the subject of the sale or any part thereof by the defendant to satisfy the statute, and the jury having found for the plaintiff, the case came on exceptions to the United States Supreme Court. The judgment of the court below was reversed. The Supreme Court held, that although it is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do, amount to a receipt and acceptance within the terms of the statute of frauds: Bushel *v.* Wheeler, 15 Q. B. 442; Morton *v.* Tibbett, 15 Q. B. 428; Borrowscale *v.* Bosworth, 99 Mass. 378, 381; Wartman *v.* Breed, 117 Mass. 18; yet where the facts in relation to a contract of sale alleged to be within the statute of frauds are not in dispute, it belongs to the court to determine their legal effect. Shepherd *v.* Pressey, 32 N. H. 49, 56. And so it is for the court to withhold the facts from the jury when they are not such as can in law warrant finding an acceptance; and this includes cases where, though the court might admit that there was a *scintilla* of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence. Denny *v.* Williams, 5 Allen, 1, 5; Howard *v.* Borden, 13 Allen, 299; Pinkham *v.* Mattox, 53 N. H. 600, 604. And in order to take the contract out of the operation of the statute, there must be acts of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer, as absolute owner, discharged of all lien for the price; there must be a delivery by the vendor with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter with the intent to take possession as owner. The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. By parting with the possession, the seller parts with his lien. The statute contemplates such a parting with the possession; and, therefore, as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the statute. Marsh *v.* Rouse, 44 N. Y. 643, 647; Shindler *v.* Houston, 1 N. Y. 261; Phillips *v.* Bistolli, 2 B. & C. 511; Baily *v.* Ogden, 3 Johns. 421; Remick *v.* Sandford, 120 Mass. 309, 316; Baldey *v.* Parker, 2 B. & C. 37. But the receipt and acceptance by the vendee under a verbal agreement otherwise void by the statute of frauds, may be complete, although the terms of the contract are in dispute. Receipt and acceptance by some unequivocal act, sufficiently proven to have taken place under some contract of sale, is sufficient to take the case out of the prohibition of the statute, leaving the jury to ascertain and find from the testimony what terms of sale were actually agreed on. Marsh *v.* Hyde, 3 Gray, 331; Townsend *v.* Hargraves, 118 Mass. 325. Still the acceptance by the defendant must be in the quality of vendee. The statute does not mean that the thing which is to dispense with the writing is to take the place of all the terms of the contract, but that the acceptance is to establish the broad fact of the relation of vendor and vendee. The act, or acts relied on as constituting a receipt and acceptance, to satisfy the statute, must be such as definitely to establish that the relation of vendor and vendee exists. Remick *v.* Sandford, 120 Mass. 309.

But as in Hinchman *v.* Lincoln, 124 U. S. 38, there was no receipt or acceptance by the defendant, and the receipt by the third party was not in the capacity of agent for the defendant, there was not even a receipt, much less an acceptance, by the defendant, to take the case out of the statute. While it is said in so many cases, as it was said by Holroyd, J., in Baldey *v.* Parker, 2 B. & C. 37, that, to satisfy the statute, there must be such an absolute parting with the possession of the specific goods sold to the purchaser, as to terminate the vendor's lien for the purchase-money; it must be borne in mind that this is only true, as we have shown in the previous Part, in the case where there has been a parting with the possession by the seller, of the *whole* of the goods sold. To satisfy the statute, a receipt and acceptance of "some part" of the goods sold, is sufficient. But by delivering a part of the goods sold, the vendor does not thereby

[1] Following Roberts on Frauds, pp. 181, 182.

the statute. But, in the case itself, as well as in Roberts on Frauds, the context shows that the confusion in the English cases between the acceptance and the actual receipt of the statute has

relinquish his lien on the goods which he still retains in his possession. On those he retains his lien for the purchase-money not only for those retained, but for that portion which he has delivered as well. As possession is of the very essence of a lien, when the seller parts with the absolute, unconditional possession of the goods, his lien is necessarily gone ; and yet, while this, as far as it goes, is a test of the application of the statute as far as regards the case of the parting with the possession of the whole of the goods; when only a part of the goods has been delivered and accepted, so as to meet the requirements of the statute, the vendor may still, by virtue of the part of the goods which he has retained, hold his lien for the purchase-money intact.

The statute of frauds of Missouri enacts (Rev. Stats. of Mo., of 1865, p. 440, ch. 107) that "every sale by a vendor of goods and chattels in his possession, or under his control, unless accompanied by delivery within a reasonable time (regard being had to the situation), and be followed by an actual and continued change of possession, shall be held to be fraudulent and void as against the vendor or subsequent purchasers in good faith." Allen *v.* Massey, 17 Wall. 351, was decided under this statute. The facts were that Massey and one Downing, in Missouri, moved into a house, each furnishing a part of it. That which Downing furnished was principally the parlor, library, dining-room, halls, and stairway. Both families used and occupied the parlor, library, and dining-room alike, and made equal use of the furniture of these rooms. Massey paid the expenses of the house, and attended to it; he and Downing subsequently settling and dividing the expenses. About five years after they moved into the house, Downing, being indebted to Mrs. Massey, sold and conveyed his furniture to her. At the time of the sale, Downing and Mrs. Massey went around and took an inventory of it, and agreed on the price. The transaction was completed by Downing turning over the furniture to her, and by executing and delivering to her a bill of sale duly acknowledged before a notary public. After the sale, both families continued to occupy the house and use the furniture as before ; the furniture, however, being subject to the absolute and sole control of Mrs. Massey. Subsequently to this sale Downing was decreed a bankrupt, the plaintiff being appointed his assignee. On a bill filed by the assignee to annul the sale, and to recover the furniture under the 14th section of the Bankrupt Act of 1867 (14 Stat. at Large, 522), as having been conveyed by the bankrupt in fraud of his creditors, the Circuit Court affirmed the decision of the District Court, decreeing accordingly. On appeal to the Supreme Court of the United States, the decree was affirmed. Allen *v.* Massey, 17 Wall. 351. The court said : "There was no outward sign manifested, nor *indicia* exhibited, nor notice given, which could apprise the community of any change of ownership. The object of the statute is to prevent parties from being misled by apparent ownership of property where real ownership does not exist, but where a secret transfer has been made to another. This object would be defeated if a sale like the present one could be upheld." The court referred to Claflin *v.* Rosenberg, 42 Mo. 439, where the question involved was similarly decided, and as the statute was a local one, applying only to sales in Missouri, they followed the construction given to the statute by the highest court of the State.

In Claflin *v.* Rosenberg, *Ibid.*, where the vendor had become the clerk of the purchaser, the Supreme Court of Missouri held that the possession which the purchaser was required to take of the property sold, in order to render the sale valid under the statute, must be open, notorious, and unequivocal, such as would inform the public, or those who were accustomed to deal with the party, that the property had changed hands, and that the title had passed from the vendor to the purchaser; observing at the same time that possession of this kind excluded the idea of a joint or concurrent possession with the vendor.

In the Province of Quebec, where, by their code, it is provided that, in commercial matters, where the value exceeds $50, upon any contract for the sale of goods, *unless the buyer has accepted or received* part of the goods or given something in earnest to bind the bargain, no action can be brought against any party or his representatives unless there is a writing signed by the party to be charged ; it was held by the Superior Court of that province, affirmed by their Court of Queen's Bench, on appeal, that parol evidence of this *acceptance or receipt* could not be given. On appeal to the Supreme Court of Canada, this absurd decision was, of course, reversed, and unanimously so. Munn *v.* Berger, 10 S. C. of Can. R. 512.

prevented the clear recognition of the difference between the acceptance and the actual receipt at which the statute itself so clearly points. Thus, although in Outwater *v.* Dodge,[1] the selecting and designating the particular goods would seem to be treated as though this did, as it does, amount to an acceptance of the subject of the purchase to satisfy the statute, the court go on to say: "The acceptance need not be by the vendee in person. It may be by his agent, acting under either a general or special authority. The defendants in this case certainly never *actually* themselves *accepted* the fish in question." Here, although having conceded that "the selection of the goods," etc., may amount to an acceptance, they use the term "the defendants never actually themselves accepted" the goods, where they merely meant to say that the defendants never *actually received* them.

In the later New York case of Heermance *v.* Taylor,[2] the court quote the language used in Stone *v.* Browning,[3] so common in the English cases, that there must be an "actual acceptance" of the goods by the purchaser to take the case out of the statute. Yet in Heermance *v.* Taylor, within the language used in Outwater *v.* Dodge,[4] that "the selection of the goods," etc., "may amount to an acceptance," there was very much in effect the same acceptance and actual receipt of the subject of the purchase to take the case out of the statute as there was in Cusack *v.* Robinson.[5]

In Heermance *v.* Taylor the action was brought to recover the agreed price of a quantity of butter, alleged to have been sold by the plaintiff to the defendant, for upwards of $50. The facts were that the plaintiff and defendant went into the cellar in New York where the butter was, and bored into and examined several firkins of the butter, after which the defendant purchased twenty firkins out of the lot of forty from which the firkins examined had been taken, and directed them to be sent to him at Albany. This was done; the butter being "received and placed in the defendant's cellar," in a pile by itself. The defendant was absent from Albany, and returned home two or three days after the arrival of the butter at his store. On the morning following his return he again examined the butter, and then shipped it back to the plaintiff, notifying him that he should not accept it, because, he alleged, it was not the butter he had purchased. As a matter of fact it was the butter he had purchased. The complaint having been dismissed at the circuit, the court at general term refused a new trial. They held that there was a delivery of the butter, and, therefore, necessarily, an actual receipt of it, but that that

[1] 6 Wend. 397, 402.
[2] 14 Hun, 149.
[3] 51 N. Y. 211.
[4] 6 Wend. 397, 402.
[5] 1 B. & S. 299.

did "not amount to the acceptance required by law." Citing Stone *v.* Browning[1] and Caulkins *v.* Hellman,[2] to the effect that "Evidence that the goods were as represented, and corresponded with the samples, was not material upon the question of acceptance," they said: "Under this authority we think the ruling of the court below was correct. The plaintiff had fully performed on his part. He had delivered the goods as directed. The goods were those which had been actually purchased." Admitting that the goods were those which had been actually purchased, making, as we think Cusack *v.* Robinson[3] correctly holds, the acceptance of the statute, the actual receipt was very much clearer than it was in this latter case; yet the Supreme Court of New York affirmed the decision of the court below, misled, we think, by the language quoted, that "A delivery of property, to satisfy the requirement of the Statute of Frauds, must be a delivery by the vendor with the intent of vesting the right of possession in the vendee, and there must be an *actual* [the italics are theirs] acceptance by the latter with the intention of taking possession as owner." There was, as is in effect admitted, in the case itself, the delivery by the vendor, in Heermance *v.* Taylor,[4] and the *actual receipt* by the vendee, and as the goods which he had actually received were those which he had "actually purchased," we think there were both the acceptance and the actual receipt of the butter in question to satisfy the statute.

The later case in the New York Court of Common Pleas of Grey *v.* Cary,[5] (A. D. 1880) we think, is a well-decided case on both the subjects of the acceptance and the actual receipt of the statute. In this case the defendants made an oral contract with the plaintiff for the purchase of a scale of the Fairbank's patent, for sixty dollars. The scale was seen and selected by the defendants before the purchase; so, expressly on this ground, the court held that there was "no doubt of the acceptance." But the court held, again clearly correctly, that as the scale, which while in the possession of the plaintiff's carter was broken, and its receipt (usually called its acceptance) being refused by the defendants, the scale never having passed into their possession had not been actually received by them, and the statute was not satisfied. In this case the marked and important distinction between the acceptance and the actual receipt of the statute is well taken.

In Knight *v.* Mann[6] the court recognize as an acceptance the purchase of a specific, ascertained chattel inspected and examined by the purchaser at the time of the agreement, citing Cusack *v.*

[1] 51 N. Y. 211.
[2] 47 N. Y. 449.
[3] 1 B. & S. 299.
[4] 14 Hun, 149.
[5] 9 Daly, 363.
[6] 118 Mass. 143, 145.

Robinson[1] and Bog Lead Mining Co. *v.* Montague.[2] In Townsend *v.* Hargraves,[3] where there was a sale of wool by sample for a given price *per* pound, and the bales were specifically designated by the terms of the contract, there is the usual misuse of the term "acceptance,"[4] as though it were synonymous with receipt, but the acceptance, under the above authorities, is clear, as the assenting to the specific wool as the subject of the purchase.

In Knight *v.* Mann,[5] while holding that there was no evidence of acceptance in the case, it was conceded throughout the controversy that there was sufficient evidence of delivery. From the facts as stated it would seem that there was no evidence whatever of delivery (actual receipt), but it is by no means as clear that the facts did not show an acceptance of the subject of the sale.

And in Safford *v.* McDonough[6] there is again the improper confounding of the acceptance of the statute with the actual receipt. The court say: "The question is whether the defendant had accepted and received the goods so as to take the case out of the Statute of Frauds, and thus complete and make valid the oral contract relied on. Unless there was such acceptance and receipt there was no valid contract by virtue of which the title to the goods would pass to the defendant. To constitute this there must be a delivery by the seller, and some unequivocal acts of ownership or control of the goods on the part of the purchaser." And yet in this case the purchaser examined the specific goods, had them weighed, marked with the initials of his name, and piled up by themselves to be taken away by him upon giving a satisfactory note for the price or the payment of the price in money, but not otherwise. Both the Superior Court and the Supreme Court of Massachusetts held that "there was no actual acceptance and receipt of the goods by the defendant." As this case was decided subsequently to Cusack *v.* Robinson,[7] which is cited by the Supreme Court of Massachusetts in the case, their confounding the acceptance with the actual receipt is entirely inexcusable. While the evidence of the acceptance was conclusive, there was no evidence whatever in the case of the actual receipt of the statute.

In Rodgers *v.* Jones[8] there is a similar confounding of the acceptance with the actual receipt of the statute, where again there was the clearest evidence of the acceptance, but no evidence whatever of the actual receipt of the statute.[9]

[1] 1 B. & S. 299.
[2] 10 C. B. N. S. 481.
[3] 118 Mass. 325.
[4] See pp. 332, 333.
[5] 120 Mass. 219, 220; s. c. 118 Mass. 143.
[6] 120 Mass. 290.
[7] 1 B. & S. 299.
[8] 129 Mass. 420.
[9] Young *v.* Blaisdell, 60 Me. 272, is a similar case.

Shindler *v.* Houston[1] is a very similar case. In this case there was the purchase of specific, ascertained lumber, showing, within the meaning of the statute, a clear "acceptance" of the lumber. In the judgments of Gardiner and Wright, JJ., the term "acceptance" is repeatedly used as though it were the equivalent simply of receipt. Thus the latter, after citing several cases to show what constitutes delivery, says: "In these cases, and in a large number of others that might be cited, the circumstances were unequivocal to show, not merely a delivery to and acceptance of the property in the goods, but, what is always essential, a complete acceptance [meaning a receipt] of the possession, by the buyer." So acceptance, instead of receipt, is used as the correlative of "transfer" or delivery. And again: "I think I may affirm with safety that the doctrine is now clearly settled that there must not only be a *delivery* by the seller, but an *ultimate acceptance of the possession of the goods by the buyer*, and that this delivery and *acceptance* [meaning receipt] can only be evinced by unequivocal acts independent of the proof of the contract."[2] Bronson, J., on the contrary, uses the terms "accept" and "receive" with critical accuracy, and properly confines the discussion in the case to the question, specifically, whether there had been an actual receipt in the case or not, and properly concludes that, as "there was no delivery, either actual or symbolical," of the lumber, there was no actual receipt of it.[3]

In Somers *v.* McLaughlin,[4] as in Cusack *v.* Robinson,[5] the distinction between the acceptance and the actual receipt is recognized; and it was there held that when there is a verbal contract of sale of specific property, the terms fixed, with an order of delivery at a designated place, and the goods are delivered at such place, the statute is satisfied; the acceptance having been complete when the bargain was made.

In Harvey *v.* St. Louis Butchers', &c. Assoc.[6] the judge of the Circuit Court, in his instructions to the jury, thus correctly stated

[1] 1 N. Y. 261.

[2] *Ibid.* pp. 271, 273.

[3] *Ibid.* 266 *et seq.* Hewes *v.* Jordan, 39 Md. 472, is a valuable case on the subject, as is also Safford *v.* Downing, 2 Lowell, 563. These cases come very near to the proper distinction which exists between the acceptance and the actual receipt of the statute. And see Gray *v.* Davis, 10 N. Y. 285; Caulkins *v.* Hellman, 47 N. Y. 449; Stone *v.* Browning, 51 N. Y. 211; Brewster *v.* Taylor, 63 N. Y. 587; Cooke *v.* Millard, 65 N. Y. 352; Stone *v.* Browning, 68 N. Y. 598; Edwards *v.* Grand Trunk Ry., 54 Me. 105; Brand *v.* Focht, 3 Keyes, 409; Washington Ice Co. *v.* Webster, 62 Me. 341; Harvey *v.* St. Louis Butchers' Assoc., 39 Mo. 211; Jones *v.* Mechanics' Bank, 29 Md. 287; Gibbs *v.* Benjamin, 45 Vt. 124; Smith *v.* Brennan, 62 Mich. 349; Bacon *v.* Eccles, 43 Wis. 227; Ullman *v.* Barnard, 7 Gray, 554; Simmons' Hardware Co. *v.* Mullen, 33 Minn. 195; Fontaine *v.* Bush, 40 Minn. 141. In nearly all of these cases there is the same failure as there is in so many of the English cases to properly discriminate between the acceptance and the actual receipt of the statute.

[4] 57 Wis. 358, 363.

[5] 1 B. & S. 299.

[6] 39 Mo. 211.

the law: "The jury are instructed that an acceptance, within the meaning of our statute, may be prior to the receipt of the cattle; and if the jury find in this case that there was a verbal sale of a specific lot of cattle, as stated in the petition, and there was an acceptance of said cattle at the time of the sale, and there was a subsequent delivery of said identical cattle at a place and time designated by the defendant, whereby the plaintiff parted with the possession with the intent of putting an end to all his title, interest, and possession in said cattle, such contract must be regarded as partially or fully executed and valid under our statute, and if the jury so find, they will find for the plaintiff." Again: "If the jury find from the evidence that the plaintiff had a specific lot of cattle which the defendants by their agent examined and agreed with the plaintiff to purchase and take at the price of $72.50 per head, then this constituted an acceptance of said lot of cattle prior to their delivery." The jury having found for the plaintiff, the Supreme Court, on appeal, in effect sustain the correctness of the law as thus laid down in the instructions, and, correctly distinguishing the actual receipt from the acceptance, while holding that the facts did not show an actual receipt of the cattle by the defendants, as there was no transmission of possession from the plaintiff to the defendants, they say, "The statute provides that no sale of goods shall be valid unless the buyer shall accept part of the goods so sold and actually receive the same. *The goods must not only be accepted, but actually received. An acceptance ascertains the identity and quality of the goods sold*, and the receiving of them changes the possession. The question here is not so much of an acceptance as of a delivery and receipt of the cattle. The number and quality were sufficiently ascertained [the acceptance], but there was no delivery of possession."

The correctness of the law as thus laid down was recognized in Lyle *v.* Shinnebarger,[1] where again both the acceptance and the actual receipt are insisted on, as it is declared that these words are not to be taken as so synonymous in character that they may be used interchangeably; as they have been in literally hundreds of cases in England and this country.

So, in Vietor *v.* Stroock,[2] it was held in the New York City Court, that the vendee, having accepted goods which he had purchased, could not after their subsequent receipt reject them, — that is, as we have shown, that he could not do both of the expressly antagonistic things, accept and reject the goods. He might, under the statute, accept and refuse to receive; but he

[1] 17 Mo. Ap. 66.

[2] 3 N. Y. Supp. 801.

could not, within the clear meaning of the language in the statute, both accept and reject. Victor *v.* Strook[1] was affirmed on appeal by the Court of Common Pleas.[2]

As the result of the whole investigation, we conclude, with even greater certainty than when at an earlier stage of this discussion of the subject we expressed the same views, (1) that the *acceptance* and the *actual receipt* of the statute are separate entities; (2) that as acceptance is not synonymous with receipt, therefore "actually" is not used in combination with "receive," to show that the receipt, as "actually receive," is different from receive in the sense that the receipt may not be symbolical or constructive, but must be manual; and therefore that "accept and actually receive" do not mean receive and actually receive; but (3) that, as acceptance is one thing and the actual receipt quite another, there must be not only the acceptance but the actual receipt as well, and that, in the sense of the statute, though there may have been an acceptance, there is no *actual* receipt unless and until there have been an actual transmission of the possession of the goods so actually received from the vendor to the vendee, with the vendor's lien and the right of *stoppage in transitu*, on and in connection with the goods so transferred and actually received, utterly extinguished. This, we think, is the solution of the whole question of the actual receipt, and all well-decided cases on the subject must rank themselves within these principles.

Hence, as a corollary, where there have been an acceptance and an actual receipt of the whole of the goods, an action for the price as for goods sold and delivered will lie against the vendee, and, reciprocally, he can maintain trover for the goods against any one wrongfully withholding them.[3]

[1] 3 N. Y. Supp. 801.

[2] Victor *v.* Stroock, 5 N. Y. Supp. 659. See also Cross *v.* O'Donnell, 44 N. Y. 661; Allard *v.* Greasert, 61 N. Y. 1, 5, where there is also a clear recognition of the distinction which exists between the acceptance and the actual receipt of the statute. And see *supra*, Book IV., Parts V. and VI., where further cases are considered as to acceptance and actual receipt.

[3] For further American cases on the actual receipt of the statute, mainly in effect the same as the English cases we have cited, see Janvrin *v.* Maxwell, 23 Wis. 51; Menzies *v.* Dodd, 19 Wis. 343; Hardell *v.* McClure, 1 Chand. 271; Ely *v.* Ormsby, 12 Barb. 570; Artcher *v.* Zeh, 5 Hill, 200; Rappleye *v.* Adee, 65 Barb. 589; Shindler *v.* Houston, 1 N. Y. 261; Evans *v.* Harris, 19 Barb. 416; Gray *v.* Davis, 10 N. Y. 285; Woodford *v.* Patterson, 32 Barb. 630; Bissell *v.* Balcom, 39 N. Y. 275; Means *v.* Williamson, 37 Me. 556; Hondlette *v.* Tallman, 14 Me. 400; Chapman *v.* Searle, 3 Pick. 38; Riddle *v.* Varnum, 20 Pick. 280; Green *v.* Merriam, 28 Vt. 801; Chamberlain *v.* Farr, 23 Vt. 270; Jackson *v.* Watts, 1 McCord (S. C.), 288; Dole *v.* Stimpson, 21 Pick. 384; Marsh *v.* Hyde, 3 Gray, 331; Davis *v.* Moore, 13 Me. 424; Damon *v.* Osborn, 1 Pick. 476; Thompson *v.* Alger, 12 Met. 435; Davis *v.* Eastman, 1 Allen, 422; Denny *v.* Williams, 5 Allen, 1; Snow *v.* Warner, 10 Met. 136; Howard *v.* Borden, 13 Allen, 299; Quintard *v.* Bacon, 99 Mass. 185; Knight *v.* Mann, 118 Mass. 143; Townsend *v.* Hargraves, *Ib.* 325; Johnson *v.* Cuttle, 105 Mass. 447; Dean *v.* Tallman, *Ib.* 443; Knight *v.* Mann, 120 Mass. 219; Safford *v.* McDonough, *Ib.* 290; Atherton *v.* Newhall, 123 Mass. 141; Marsh *v.* Rouse, 44 N. Y. 643; Kirby *v.* Johnson, 22 Mo. 354; Rickey *v.* Ten-

While we have so strongly insisted upon the distinction existing between the acceptance and the actual receipt of the statute as separate entities, it may not be amiss here to point out, although this is a subject we consider more particularly in a later volume of this work, that while accepting and actually receiving under the statute mean different things, accepting, as used in the statute differs essentially from the term "appropriating." Thus, there may be an acceptance of a part or the whole of goods, purchased, and an actual receipt of a part of them, to satisfy the statute, and yet the property in those not actually received by the vendee may not pass to him for want of delivery or appropriation.

The old case in the United States Circuit Court of Barrett *v.* Goddard,[1] is an illustrative case. There the sale was of a number of bales of cotton specifically sold by numbers, which, as a purchase of ascertained goods, was an acceptance of them to satisfy the statute. One of the terms of the purchase was that the cotton might lie in the vendor's warehouse for the vendee, free of charge, until the room was required by the vendor for the storage of other goods. This, as we have seen in our examination of the English cases, *supra*, is a sufficient actual receipt by the vendee to satisfy the statute; the vendor ceasing to hold the goods as vendor, and holding them merely as bailee for the vendee; his lien on the goods for the price as unpaid vendor having ceased to exist. But though the statute might be satisfied with an acceptance of the whole or of a part of the goods and an actual receipt of a part of them, without an appropriation of the goods the property in them would not pass to the vendee, but would remain in the vendor with his lien attached as unpaid vendor, and an action as for goods sold and delivered would not lie against the purchaser, nor could trover be maintained against the seller.

Thus, in Barrett *v.* Goddard, Story, J., in delivering the judgment, says: "When a contract for the sale of goods is completed by the assent of both parties, the property in the goods is transferred to the vendee, and the price is due to the vendor, but the vendee cannot take the goods until he tenders the price agreed on. And if the price is tendered, and the vendor refuses it, the vendee may seize the goods, or have an action against the vendor for

broeck, 63 Me. 563; Shepherd *v.* Pressey, 32 N. H. 49; Gault *v.* Brown, 48 N. H. 183; Pinkham *v.* Mattox, 53 N. H. 600; Matthiessen, &c. Refining Co. *v.* McMahon's Adm'r., 38 N. J. L. 536; Farmer *v.* Gray, 16 Neb. 401; Marshall *v.* Ferguson, 23 Cal. 65; Lloyd *v.* Wright, 25 Ga. 215; Bowers *v.* Anderson, 49 Ga. 143; Belt *v.* Marriott, 9 Gill, 331; Gorham *v.* Fisher, 30 Vt. 428; Hill *v.* McDonald, 17 Wis. 97; Ortloff *v.* Klitzke, 48 Minn. 154; Terney *v.* Doten, 70 Cal. 399; Richards *v.* Burroughs, 62 Mich. 117; Smith *v.* Brennan, *Ib.* 349; Smith *v.* Fisher, 59 Vt. 53; *Re* Hoover, 33 Hun, 553; Dehority *v.* Paxson, 97 Ind. 253, 255 *et seq.*; Wilkinson's Adm'r *v.* Wilkinson, 61 Vt. 409; Sullivan *v.* Sullivan, 70 Mich. 583.

[1] 3 Mason, 107.

detaining them. Such is the doctrine laid down by Mr. Justice Blackstone in his excellent Commentaries.[1] The principle here stated must apply with equal force whenever the terms of the sale are completely complied with on the part of the vendee. Therefore where goods are sold to be paid for by a note on time, and the note is given to the vendor, the property in the goods passes to the vendee in the same manner, and under the same circumstances, as it would if the contract were for cash, and the cash were paid. But this doctrine, however, is applicable only in cases where the goods are clearly designated and separated from all others, and according to the sense of the contract, are then deliverable, without any further act on either side, and are in a state capable of delivery. But if there remains anything more to be done to designate the particular property, or to complete the rights of the vendee, then the property does not pass until such acts are done." And the court, in concluding that in the case the property had passed, said: "The bales were all marked and numbered, and sold by their marks and numbers. They were perfectly distinguishable from all the others; and the terms of the contract on the other side were fully complied with. The payment was made in the mode agreed on, by giving a note, payable at a future time. Neither party contemplated any further act to be done. The vendee contracted for an immediate possession at his own option as to time and place, and the vendor sought no retainer."[2]

[1] 2 Bl. Com. 448.

[2] And see Weld *v.* Came, 98 Mass. 152; Townsend *v.* Hargraves, 118 Mass. 325, 331 *et seq.*; Safford *v.* McDonough, 120 Mass. 290; Rodgers *v.* Jones, 129 Mass. 420; Halterline *v.* Rice, 62 Barb. 593; Mixer *v.* Howarth, 21 Pick. 205; Rohde *v.* Thwaites, 6 B. & C. 388; Maberley *v.* Sheppard, 10 Bing. 99; Atkinson *v.* Bell, 8 B. & C. 277; Alexander *v.* Gardner, 1 Bing. N. C. 671; Boswell *v.* Kilborn, 15 Moo. P. C. 309; Andrews *v.* Durant, 11 N. Y. 35; Messer *v.* Woodman, 22 N. H. 172, 182; Vietor *v.* Stroock, 5 N. Y. Supp., at p. 660. And see cases cited in notes to *supra*, pp. 253–256, on property passing on appropriation; and notes to *ante*, pp. 311, 312.

BOOK IV.

PART VIII.

THE NOTE OR MEMORANDUM IN WRITING.

A DISTINCTION, which we think is unwarranted, has been taken between the requirements of the fourth and seventeenth sections of the statute, with reference to what the note or memorandum of the agreement, or contract, or bargain, respectively referred to in those sections, must contain. By the fourth section, where the terms, "special promise," "contract," "sale," "agreement," are used, it is provided, concerning all these terms, that the *agreement* upon which the action is to be brought, or some memorandum or note thereof, must be in writing, signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. By the seventeenth section, it is provided, that, to make the *contract* be deemed good, there must be some note or memorandum in writing of the *bargain*, made and signed by the parties to be charged by *such contract*, or their agents thereunto lawfully authorized. Here, obviously, in the seventeenth section, the terms "bargain" and "contract" are used interchangeably, as, also, are the terms "contract" and "agreement" in the fourth section. Not only so, but the term "bargain" is also used in the previous portion of the seventeenth section, in connection with the giving of "something in earnest" "to bind the bargain," in the colloquial sense in which that term was in common use at and long prior to the enactment of the statute, as the exact equivalent of contract or agreement. So, between the three terms, bargain, contract, and agreement, thus used synonymously or interchangeable, there is not, we think is apparent, the slightest substantial distinction. So, too, under both sections, the note or memorandum in writing, of such contract, bargain, or agreement, to be signed, under the fourth section, "by *the party* to be charged therewith, or by some person thereunto by *him* lawfully authorized;" or under the seventeenth, "by *the parties* to be charged by such contract, or *their agents* thereunto lawfully authorized," is, in effect, the same under the one section as in the other; or, if,

from the phraseology of the respective sections, there is any distinction to be taken, it is clearly *not* that anything more is required to be expressed in the note or memorandum under the fourth section than under the seventeenth.

Yet, under the leading English cases of Wain *v.* Warlters,[1] and Egerton *v.* Mathews,[2] it is very clearly implied, and generally conceived to be decided,[3] that a very substantial distinction exists between the note or memorandum of the contract, bargain, or agreement, required under these respective sections; and that, as the word "agreement" is used in the fourth section, while the word "bargain" is employed in the seventeenth section, more is

[1] 5 East, 10.

[2] 6 East, 307.

[3] Tindal, C. J., in Laythoarp *v.* Bryant, 2 Bing. N. C. 735, 744, says: "Wain *v.* Warlters, 5 East, 10, was decided on the express ground that an agreement under the fourth section imports more than a bargain under the seventeenth." Such, clearly, is the view expressed by Lord Ellenborough in Wain *v.* Warlters, 5 East, 10, and in Egerton *v.* Mathews, 6 East, 306; but, as we show, *infra*, these cases are both clearly sustainable without the necessity of admitting the existence of what we think is an entirely untenable distinction. In Marshall *v.* Lynn, 6 M. & W. 109, 118, Alderson, B., says: "By the 4th section of the statute of frauds, it is provided that the contracts therein mentioned shall be in writing, otherwise, no action shall be maintained on them. The 17th section requires that some note or memorandum in writing of the bargain before made, shall be signed by the party to be charged by such contract, or his agent lawfully authorized. There is, undoubtedly, a distinction between the two enactments, for by the 4th section, the whole contract must be in writing, including the consideration which induced the party to make the stipulation by which he is to be bound; but by the 17th section, it is sufficient if all the terms by which the defendant is to be bound are stated in writing, so as to bind him." We think Alderson, B., here, does not succeed in sustaining the distinction. While, under the 4th section, the agreement under which the action is brought, is evidence to sustain the action; some memorandum or note in writing of the agreement is as expressly by the section made as good to sustain the action under the 4th section, as, under the 17th section, it is to cause the contract or bargain to be deemed good. What that agreement, contract, or bargain is, has, by the note or memorandum in writing, as much to be expressed in the one case as in the other. And the contract for the sale of goods, wares, and merchandises, under the 17th section, need not be, nor is usually, any more "made before" the signing of the note or memorandum in writing, than it is under the 4th section, where there is an agreement by one to pay the debt of another; or an agreement not to be performed within a year; or for an executor or administrator to pay damages out of his own estate. The statement by Alderson, B., in Marshall *v.* Lynn, 6 M. & W. 109, 118, was entirely *extra-judicial*, as in that case it was held, on the point involved, that there was no distinction to be taken between the 4th and 17th sections of the statute. In that case it was claimed, on the authority of Cuff *v.* Penn, 1 M. & S. 21, and Goss *v.* Lord Nugent, 5 B. & Ad. 58, that, with reference to the power of varying the contract by parol evidence, there was a distinction between the 4th and 17th sections; but this contention was not sustained, Parke, B., saying: "The same rule must prevail as to the construction of the 17th section of the statute of frauds, which has already prevailed as to the construction of the 4th section. The decision in Goss *v.* Lord Nugent, 5 B. & Ad. 58, the principle of which I have no doubt is perfectly correct, has clearly established, with respect to the case of a contract relating to the sale of an interest in lands, that if the original written contract be varied, and a new contract, as to any of its terms, substituted in the place of it, that new contract cannot be enforced in law, unless it also be in writing. The question is, whether the same reasoning does not apply to a contract for the sale of goods under the 17th section. It appears to me that no distinction can be made." And the court, following Stead *v.* Dawber, 1 P. & D. 447, held that the same construction was to be placed on the 17th section of the statute as was placed on the 4th section by the decision in Goss *v.* Lord Nugent, 5 B. & Ad. 58.

required to be set out in the note or memorandum under the fourth section than under the seventeenth. But, as we have shown, as in both sections the even more strictly technical term "contract" is used, and used too as the equivalent of agreement, in the one section, and of bargain in the other; and as the term "bargain" is in the seventeenth section previously used in the full and undoubted sense of agreement, there is no force whatever in the implication to which we have above alluded. Whatever is required to be expressed in the note or memorandum in writing of the contract or agreement, to sustain an action under the fourth section, is, we think, necessary to be set out in the note or memorandum in writing, to cause the bargain, or contract, or agreement to be deemed good under the seventeenth section. And any cases decided on the ground of the existence of such a distinction are not, we think, on that ground, well decided.

Still, notwithstanding such distinction, which is taken in Wain *v.* Warlters,[1] and Egerton *v.* Mathews,[2] and which we think is utterly untenable, we are of the opinion that both of these cases are thoroughly well decided, although we think that there is, in these cases, reasoning, outside of the distinction which Lord Ellenborough sought to establish between the meaning of the fourth and seventeenth sections, which is open to much question, and which has not been followed or approved in later cases whether under the fourth or seventeenth section of the statute.

In Wain *v.* Warlters,[3] the note or memorandum of the contract declared on, was as follows: "Messrs. Wain & Co., I will engage to pay you by half-past four this day, fifty-six pounds and expenses, on bill that amount on Hall. Jno. Warlters, No. 2 Cornhill, April 30th, 1803." It was alleged in the declaration that Hall had accepted a bill of exchange of which the plaintiffs were the holders, which, being overdue and unpaid, the defendant promised to pay on consideration that the plaintiffs would forbear suit on the bill, which they did. The case, therefore, was one of a promise to pay the debt of another; to sustain an action on which, under the fourth section of the statute, it is required that the agreement or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. The court held that as no consideration for the defendant's promise appeared on the written instrument, no contract was shown; the undertaking for want of a consideration being *nudum pactum*. As the statute requires that the written contract, or a note or memorandum in

[1] 5 East, 10.
[2] 6 East, 307.
[3] 5 East, 10.

writing of the contract, is necessary to sustain the action, thus rendering insufficient for that purpose, a note or memorandum, not of the contract, or bargain, or agreement, but of the mere promise or undertaking of the party whom it is sought to charge on his agreement; Lord Ellenborough would seem to us to have well held, in nonsuiting the plaintiffs, that the term "agreement" imports the substance at least of the terms on which both parties consented to contract, and, as the agreement or contract includes the consideration moving to the promise, as well as the promise itself; where the agreement in this sense has not been reduced to writing, the fourth section of the statute is not satisfied; the written evidence of the consideration, a most material part of the contract or agreement, being wanting. And this holding, we think, was well sustained by the full court.

The question came up in Egerton *v.* Mathews [1] under the seventeenth section of the statute. There the note or memorandum of the contract, signed by the defendants, was: "We agree to give Mr. Egerton 19*d.* *per* lb. for 30 bales of Smyrna cotton, cash 3 *per* cent, as soon as our certificate is complete." On the trial before Lord Ellenborough, in an action for not accepting and paying for the cotton, the plaintiff was nonsuited on the grounds that no consideration for the promise appeared on the face of the writing, nor any mutuality in the engagement; and, therefore, that there was no good contract within the statute. A rule *nisi* to set aside the nonsuit was granted on the ground that, as the case came within the seventeenth section of the statute, it was not governed by the decision in Wain *v.* Warlters.[2] The rule was made absolute, Lord Ellenborough observing: "That the words of the statute were satisfied, if there were 'some note or memorandum in writing of the bargain, signed by the parties to be charged by such contract.'[3] And this was a memorandum of the bargain; or,

[1] 6 East, 307.

[2] 5 East, 10.

[3] Commenting on this, Blackburn (Contract of Sale, 2d ed. 57) says: "There is some difficulty in understanding what was the objection to the memorandum as a memorandum of an agreement, and consequently it is difficult to say what the distinction was which Lord Ellenborough made between bargain and agreement, but it appears that he made some distinction." As the very thing that was deficient in the memorandum in Wain *v.* Warlters, 5 East, 10, as regards the statement of the consideration, was supplied in Egerton *v.* Mathews, 6 East, 307, and yet Lord Ellenborough entertained the view that had this latter case been one under the 4th section instead of under the 17th section, the action could not have been maintained; there seems to us to be but one intelligible mode of explaining his position as to the effect of the clauses in the two sections. It was claimed in Wain *v.* Warlters, that the term "agreement" (*aggregatio mentium*, or the union of two minds, in a thing done or to be done) was more applicable to other clauses of the 4th section than to that of the promise to pay the debt of another. And in Egerton *v.* Mathews, 6 East, 307, the nonsuit was claimed not only on the ground that no consideration appeared on the face of the writing, but that no mutuality appeared either. In Wain *v.* Warlters, neither consideration nor mutuality appeared. In Egerton *v.* Mathews, the

at least, of so much of it as was sufficient to bind the parties to be charged therewith, and whose signature to it is all that the statute

consideration appeared, but no mutuality. And yet, had Egerton *v.* Mathews been a case under the 4th section of the statute, Lord Ellenborough held that the action could not have been maintained. The deduction, then, from these two cases would seem to be that it was decided that, under the 4th section, not only the consideration, but the mutuality, must appear on the face of the note or memorandum in writing of the contract; that the term agreement implies mutuality, and that, under the 4th section, the whole agreement must appear in the writing; but that, under the 17th section, as stated in the reporter's note to Egerton *v.* Mathews, 6 East, 307, "a memorandum signed by the defendants, whereby they agree to give so much for goods, takes the case out of the 17th section, *though not signed by the seller, nor expressing any consideration for the defendant's promise, otherwise than by inference from their own obligation.*" The implication being that, on the other hand, under the 4th section, the whole agreement must be shown, and, therefore, not only the consideration, but the mutuality of the agreement — both parties being bound by it — must appear on the face of the contract; the result of which view would seem to be that, to show such mutuality as well as the consideration, the memorandum or note in writing, under their view of the requirements of the 4th section, to be operative even against the party to be charged, would have to be signed by both the parties to the agreement. This seems to be the view taken by the court, including Lord Ellenborough in Egerton *v.* Matthews, 6 East, 307; but it is certainly not consistent with his view in Wain *v.* Warlters, 5 East, at p. 16, of the correctness of the holding of Lord Eldon in Seton *v.* Slade, 7 Ves. 265, where the agreement was signed by the vendee, and not by the vendor, and was held binding under the 4th section of the statute. The language, however, of Grose, J., in Wain *v.* Warlters, is consistent with the apparent view of the whole court in Egerton *v.* Mathews, 6 East, 307, that, under the 4th section, the whole agreement must appear in writing, showing a consideration resulting from the mutuality of the contract between the parties, and equally binding on them both, and, apparently, implying that the writing should be signed by them both; but that, under the 17th section, the memorandum is good though not signed by the seller, if signed by the vendee as the party to be charged; and the consideration, under the section, may be shown as an inference from the promisor's own obligation, without it being expressly shown by the agreement of the seller on the face of the note or memorandum in writing. Thus Grose, J., says: "What is required to be in writing is the *agreement* (not the promise, as mentioned in the first part of the clause), or some *note or memorandum of the agreement.* Now the *agreement* is that which is to show what *each party* is to do or perform, and by which *both parties* are to be bound; and *this* is required to be *in writing.* If it were only necessary to show what *one* of them was to do, it would be sufficient to state the *promise* made by the defendant who was to be charged upon it. But if we were to adopt this construction, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent; for without the parol evidence, the defendant cannot be charged upon the written contract, for want of a consideration in law to support it. The effect of the parol evidence then is to make him liable; and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the *agreement,* by which must be understood the *whole agreement,* should be in writing." (All of the above italics are by Grose, J., himself.) The inference from this seems clear that it was their view that to make a party liable on his promise for the debt of another, the agreement of the promisee, showing mutuality and a sufficient consideration to prevent the promise from being *nudum pactum,* at common law, must all appear in the writing; and, as in Egerton *v.* Mathews, 6 East, 307, notwithstanding that the consideration there appeared in the writing, signed by the party to be charged, it was held by Lord Ellenborough that had that case been under the 4th instead of the 17th section of the statute, it still would not have been good. The conclusion seems evident that they were, in effect, holding that, under the 4th section, the consideration could not be shown by its statement or recital by the promisor, or as an inference from his own obligation, but must appear in a writing, by which, by the signature of both parties to it, "*both parties* are to be bound." So, in Lord Ellenborough's own judgment in Wain *v.* Warlters, notwithstanding his reference to the holding of Lord Eldon in Seton *v.* Slade, 7 Ves. 265, there is much that accords with the view on which he acted in granting the nonsuit in Egerton *v.* Mathews. Thus it is said:

requires." And Lawrence, J.: "The case of Wain *v.* Warlters[1] proceeded on this, that in order to charge one man with the debt

"Lord Ellenborough, C. J., after noticing the definition of the word *agreement* by Lord C. B. Comyns, who considered it as a thing to which there must be the assent of two or more minds; and which, he says, ought to be so certain and complete that each party may have an action upon it; for which, in addition to the author's own authority, was cited that of Plowden; and better (his lordship observed) could not be cited. In all cases where, by long habitual construction, the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural, ordinary signification. The clause in question, in the statute of frauds, has the word 'agreement' ('unless the *agreement*, upon which the action is brought, or some memorandum or note thereof, shall be in writing,' etc.). And the question is, whether the word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to *promise* or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract or consideration 'twixt two or more parties. The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect." It will be noticed here that Lord Ellenborough treats the consideration not as that which the promisor is to receive, but, rather, the contract, agreement, undertaking, or promise of the other party to the contract, making the effect of his holding in Egerton *v.* Mathews still clearer; viz., that, under his view, the note or memorandum in writing, under the 4th section, must contain the whole agreement or contract of both parties to it, showing, in the language of Grose, J., "what each party is to do or perform, and by which both parties are to be bound; and *this* is required to be in writing." We think, notwithstanding the holding in these cases, we have made it sufficiently clear in the text, *supra*, that the note or memorandum in writing signed by the party to be charged, has not to set out the consideration, or the *aggregatio mentium* of the parties to the contract, bargain, or agreement, under the 4th section any more than under the 17th section of the statute.

Roberts, in his work on Frauds, 117, n., commenting on Wain *v.* Warlters, 5 East, 10, and Egerton *v.* Mathews, 6 East, 307, says: "The word 'agreement' does not occur in the 17th section regarding the contracts for the sale of goods for the price of £10 or upwards; but the words are 'that some *note* or *memorandum* in writing of the bargain be made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorized.' Therefore, in Egerton *v.* Mathews, determined since Wain *v.* Warlters, in the King's Bench, which was a case governed altogether by the 17th clause, it was clearly held that it was not necessary that the writing, to be effectual within that clause, should set forth the consideration. A case very important in its consequences, as it implies that had the word in the 17th section been 'agreement' instead of 'note or memorandum' [Roberts is in error here; 'note or memorandum' is in both sections. The distinction taken was as between 'agreement' in the 4th section and 'bargain' in the 17th, as far as the distinction is at all intelligible], the plaintiff must have been nonsuited for want of a consideration sufficiently exhibited in writing, which was as follows: 'We agree to give Mr. Egerton 19*d.* *per* pound for thirty bales of Smyrna cotton, customary allowance, cash 3 *per* cent, as soon as our certificate is complete. Signed by the defendants the buyers.' The writer hopes for pardon if with great deference he submits that there is a consideration for the promise plainly stated in this writing. So much money is to be paid for such goods. This was the consideration, and this was stated. But this seems to be now considered as not sufficient; and it is implied in the case just cited that the instrument itself, where the case is within the 4th section, should import and comprehend in itself a perfect mutuality of obligation, otherwise the *whole* agreement is not to be considered as being in writing. And according to this doctrine, under that section of the statute, both parties in most cases must sign the instrument, otherwise the full consideration for the signing by the party charged will not appear upon the instrument itself, a doctrine rising greatly above the level of antecedent opinions and authorities. See Cotton *v.* Lee, cited in 2 Bro. Ch. 564; Coleman *v.* Upcot, 5 Vin. Ab. 527; Buckhouse *v.* Crosby, 2 Eq. Cas. Ab. 32, pl. 44; Seton *v.* Slade, 7 Ves. 265; Fowle *v.* Freeman, 9 Ves. 351. And what, under this doctrine, if it be the doctrine, is to become of the authorities giving an effect to letters equivalent to agreements? Wain *v.* Warlters goes only the length of deciding the necessity of stating the consideration. But when coupled with

[1] 5 East, 10.

of another, the agreement must be in writing; which word 'agreement' we considered as properly including the consideration moving

the succeeding case of Egerton *v.* Mathews the court, by these adjudications, seems to say that, as by an agreement must always be understood the assent of two or more minds, reciprocally expressed and mutually binding, and which must be so complete and certain that each party may have an action upon it, an instrument *so* perfected is necessary to satisfy the 4th section of the statute of frauds." Commenting on this, Browne on the Statute of Frauds, § 397, says: "Nor does there appear to be, as has been suggested by Mr. Roberts, any conflict between the rule that the memorandum must show the consideration of the engagement of the party who signs, and the rule that only the party to be charged need sign. The memorandum is required to be signed by the party to be charged, because it is thereby made a statement or admission of all the terms of a contract made by him, which statement is put in writing, and to which he gives his assent by signing his name." We quite concur with Browne that there is no conflict between the rule that the memorandum must show the consideration of the party who signs, and the rule that only the party to be charged need sign. But, we submit, Roberts in the note we have quoted, and to which Browne in the above has reference, does not allege any such conflict. The position he takes, which we think is accurate, and which, in effect, is not entirely unsupported by Browne himself (see *Ib.* §§ 381 *a*, 389), is that the effect of the decisions in Wain *v.* Warlters, 5 East, 10, and Egerton *v.* Mathews, 6 East, 307, goes to the extent of declaring — improperly he, with us, evidently thinks — that, under the 4th section, not only the consideration must appear in the writing, but that the writing must be signed by both parties to the agreement; or, in the language of Grose, J., in Wain *v.* Warlters, "The *agreement* is that which is to show what *each party* is to do or perform, and by which *both parties* are to be bound; and *this* is required to be *in writing*."

But if the effect of Wain *v.* Warlters, 5 East, 10, coupled with Egerton *v.* Mathews, 6 East, 307, was to show that there was any difference between the necessity for the consideration for the signer's contract or undertaking appearing in the writing signed by him, under the 4th section and under the 17th, or that any greater mutuality was required to be shown in the one case than in the other, that position is expressly overthrown. The question came up in Laythoarp *v.* Bryant, 2 Bing. N. C. 735, under the 4th section. There the defendant purchased certain leasehold premises at an auction, and signed a memorandum of the purchase on the back of a paper containing the particulars of the premises, the name of the owner, and the conditions of sale. This was not signed by the vendor. It was contended by the purchaser, the defendant, in an action on the contract, that in order to bind a purchaser of real estate there must, under the 4th section of the statute of frauds, be a mutuality in the contract as well as a consideration expressed in writing. But the court held that although the consideration must appear on the face of the agreement, the word agreement is satisfied if the writing states the subject-matter of the contract, the consideration, and is signed by the party to be charged. This decision is, in effect, under the 4th section of the statute, the same as that of Egerton *v.* Mathews, 6 East, 307. And see Buckhouse *v.* Crosby, 2 Eq. Cas. Ab. 33; Seton *v.* Slade, 7 Ves. 275; Coles *v.* Trecothick, 9 Ves. 250; Tawney *v.* Crowther, 3 Br. Ch. Cas. 161, 318; Hatton *v.* Gray, 2 Br. Ch. Cas. 164; Lord Ormond *v.* Anderson, 2 Ball & B. 370; Western *v.* Russell, 2 Ves. & B. 192; Emmerson *v.* Heelis, 3 Taunt. 169; Fowle *v.* Freeman, 9 Ves. 351; Bowen *v.* Morris, 2 Taunt. 387; Knight *v.* Crockford, 1 Esp. 190; Saunderson *v.* Jackson, 2 B. & P. 238. In Allen *v.* Bennet, 3 Taunt. 169, it was held that it is no objection to the validity of a contract for the sale of goods signed by the seller that the seller cannot enforce the same contract against the buyer, because the buyer has never signed it. Lord Mansfield, in this case, said: "It was objected that one party who has not signed is not bound; but the fact was the same in the case of Egerton *v.* Mathews, 6 East, 307, and Champion *v.* Plummer, 1 New R. 252, and the objection was never taken in either of these cases [This is a mistake. It was taken in Egerton *v.* Mathews by counsel, and was one of the two grounds on which Lord Ellenborough granted the nonsuit in that case; that there was no mutuality in the agreement. *Ibid.*, 6 East, 307.]; but the whole of this case supposes that the plaintiff had agreed. Suppose he has not contracted by writing, he has by parol, and he is bound in honor; and it has never yet been decided that an obligation in honor would not be a good consideration. All these cases — Egerton *v.* Mathews, 6 East, 307, Saunderson *v.* Jackson, 2 B. & P. 238, and Champion *v.* Plummer, 1 New R. 252 — suppose a signature by

to as well as the promise by the party to be so charged; and that the statute meant to require that *the whole agreement*, including both, should be in writing."

the seller to be sufficient, and every one knows it is the daily practice of the Court of Chancery to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can." In Laythoarp *v.* Bryant, 2 Bing. N. C. 735, the 17th section of the statute is discriminated against as being, as in fact it is, notwithstanding the holding in Wain *v.* Warlters, 5 East, 10, and Egerton *v.* Mathews, 6 East, 307, more stringent than the 4th section. Parke, B., there says: "The cases on the 17th section of the statute might very much be put out of the question, because the language of that section is different from the language of the 4th. But even in those cases, where the language of the section is *parties*, not *party*, it was not held necessary that the contract should be signed by both." And Bosanquet, J.: "The 17th section is stronger, and avoids contracts not made as the section prescribes; yet even under that section it has been held sufficient if a contract be signed by the party to be charged. In the 4th section the language is, expressly, 'the party to be charged.'"

But where there is no mutuality in fact, as without mutuality in fact there can be no consideration or contract, one party is not bound to perform his undertaking with the other; although, as in Egerton *v.* Mathews, 6 East, 307, where there is mutuality in fact, but such mutuality does not appear by the writing signed by the party whom it is sought to charge on his contract, but yet the writing contains a statement of the whole contract, including its subject-matter, and, at least inferentially, the consideration, there the contract can be enforced against the party signing the writing, the mutuality being provable *dehors* the writing. The former of these propositions is illustrated by Lees *v.* Whitcomb, 5 Bing. 34. There the defendant signed the following paper: —

"I hereby agree to remain with Mrs. Lees (the plaintiff's wife), of 302 Regent Street, for two years from the date hereof, for the purpose of learning the business of a dressmaker. As witness my hand this 5th day of June, 1826.

"AMELIA WHITCOMB."

No premium was paid by the defendant, who, on June 5, entered the plaintiff's house, and left him in April following, by which time she had made such progress in learning the business that her services were becoming valuable to the plaintiff. In assumpsit against the defendant for refusing to remain in the plaintiff's service for the remainder of the period of two years, the declaration alleged, as the consideration for the defendant's promise, that the plaintiff had agreed to teach her the business. There is no allegation or statement of this in the paper signed by the defendant; so no consideration was shown in the writing, and, therefore, there was no note of the agreement. It was objected on the part of the defendant that there was neither consideration nor mutuality, and the court so holding, the plaintiff was nonsuited. On a rule for a new trial, the court, sustaining the nonsuit, held that there was no consideration expressed in the writing for the defendant's undertaking; and that there was no mutuality, as there was nothing in the agreement to insure the instruction to the defendant. The consideration expressed in the writing in Egerton *v.* Mathews, 6 East, 307, for the price that the defendant was to pay, was the thirty bales of Smyrna cotton which he was to receive; but in Lees *v.* Whitcomb there was no consideration stated at all. In this latter case the plaintiff's name is not even mentioned, much less that he had agreed to furnish the instruction to the defendant, — the consideration alleged in the declaration. Had this been stated in the writing signed by the defendant, and had there been such an agreement in fact, we think both the principles of common law as to mutuality in contracts and the requirements of the statute would have been met. As the cases cited in this note abundantly show, it is not necessary that the note or memorandum in writing of the agreement, to bind the party to be charged thereby, should be signed by both parties to the agreement. It is obvious that where the agreement of the parties fairly appears by the writing, the fact that there is such a mutual contract may be proved, as it might have been at common law, before the statute, by parol. Notwithstanding the note or memorandum in writing, it is clearly competent for the party whom it is sought to charge, to show that the writing does not express the whole of the agreement, or that the agreement, in fact, is different from the contract relied on, and that, therefore, there is no note or memorandum in writing of the contract or bargain or agreement signed by the party whom it is sought to charge. On the

The clear effect of the holding in Wain *v.* Warlters[1] and Egerton *v.* Mathews,[2] whatever doubt there may be as to the effect of these

same principle, notwithstanding the note or memorandum in writing, it is equally competent for the party who has signed it to show that there is no contract in fact, as the other party has not assented to the terms, or has refused to assent to them. So, again, on the same principle, it would be competent for the party who had not signed the writing, and who was seeking to enforce the contract, to show that there was such a contract; that he had assented to it; and, therefore, that there was the necessary mutuality, — the *aggregatio mentium*. We think, therefore, on the principle of Wain *v.* Warlters, 5 East, 10, Egerton *v.* Mathews, 6 East, 307, and the other cases cited in this note, that had the writing in Lees *v.* Whitcomb, 5 Bing. 34, contained such language as we have suggested, or, "In consideration of the plaintiff's having agreed to pay me £50 *per* year therefor, I hereby agree to remain," etc., there would have been the necessary note or memorandum of the contract signed by the party to be charged; and that the fact that there was such a contract — such mutuality — could have been shown by the plaintiff as before the statute. It is only upon this principle that the large number of cases in England and in this country can be sustained, which hold that, in the case of the sale of goods within the 17th section of the statute, where there is a note or memorandum of the contract signed by the party whom it is sought to charge on the contract, such contract can be enforced against him, although there is no note or memorandum of the contract signed by the other party to the contract. See Saunderson *v.* Jackson, 2 B. & P. 238; Elmore *v.* Kingscote, 5 B. & C. 583; Schneider *v.* Morris, 2 M. & S. 286; Ashcroft *v.* Morrin, 4 M. & G. 450; Lobb *v.* Stanley, 5 Q. B. 574; Eley *v.* Positive Assur. Co., 1 Ex. Div. 293; Hoadley *v.* McLaine, 10 Bing. 582; Champion *v.* Plummer, 1 N. R. 252; Hodgson *v.* Le Bret, 1 Camp. 233; Phillimore *v.* Barry, 1 Camp. 513; Egerton *v.* Mathews, 6 East, 307; Cooper *v.* Smith, 15 East, 103; Kent *v.* Huskinson, 3 B. & P. 233; Allen *v.* Bennet, 3 Taunt. 169; Jackson *v.* Lowe, 1 Bing. 9; Kenworthy *v.* Schofield, 2 B. & C. 945; Hawes *v.* Forster, 1 M. & Rob. 368; Sievewright *v.* Archibald, 17 Q. B. 103; Parton *v.* Crofts, 16 C. B. N. S. 11. Wood on Sales, § 346, pp. 667–669, seems to lay down a proposition different from this, for which he cites Haddeson Gas Co. *v.* Haslewood, 6 C. B. N. S. 239; Souch *v.* Strawbridge, 2 C. B. 808; Callis *v.* Bowthamley, 7 W. Rep. 87; Sykes *v.* Dixon, 9 A. & E. 693. None of these cases, except the last of them, has a direct bearing on the question, and the last carries the doctrine no farther than it is carried by Lees *v.* Whitcomb, 5 Bing. 34. Sykes *v.* Dixon, 9 A. & E. 693, was an action for harboring one Bradley, the plaintiff's servant, who, it was claimed, had unlawfully left the plaintiff's service. On the trial the plaintiff relied on a memorandum which was signed by Bradley only, in which it was stated that he agreed to work for the plaintiff, "at such work as he shall order and direct, and no other person whatsoever, from this day henceforth during and until the expiration of twelve months, and so on from twelve months' end to twelve months' end," etc. On the plea that Bradley was not the plaintiff's servant, the defendant relied on the facts that there was no consideration expressed in the writing, and that there was no mutuality. The court held that there was no consideration shown, and that as the plaintiff had not been a party to the agreement, there was no mutuality. The authority of Laythoarp *v.* Bryant, 5 Bing. 34, was in effect admitted by the defendant's counsel, who said: "It may be that the instrument did not require the signature of both parties; but at least it should have expressed both the promise by one and the consideration moving from the other." Had this been shown, so as to satisfy the statutory requirements of a note or memorandum of the contract in writing, it is clear, under the previous authorities we have cited, that the mutuality could have been shown *dehors* the writing, as at common law; the statute requiring not the signature of both the parties to the agreement to make it binding, but only that of the party or parties to be charged.

An old case in the Supreme Court of the United States, Weightman *v.* Caldwell, 4 Wheat. 85, is an admirable illustration of the confusion which exists to so great an extent as to the consideration which, as part of and going to the very essence of the contract, the statute requires to be shown, as a part of the bargain, contract, or agreement, distinguished from the mutuality, which, as the statute is satisfied if the writing is signed by the party to be charged only, is left, inferentially, to be shown *dehors* the writing. In Weightman *v.* Caldwell, 4 Wheat. 85, the considera-

[1] 5 East, 10.

[2] 6 East, 307.

decisions otherwise, is, that whether the question arises under the fourth or the seventeenth section of the statute, as there is required

tion was shown as clearly as in Egerton *v.* Mathews, 6 East, 307, or in Stadt *v.* Lill, 9 East, 348; but, as in those cases, the mutuality was not shown. The following note or memorandum of the contract was signed by the defendant (plaintiff in error), who was the party who was sought to be charged, in Weightman *v.* Caldwell, 4 Wheat. 85: "J. W. (the defendant) agrees to purchase the share of E. B. C. (the plaintiff) in the cargo of the ship Aristides, W. P. Z., supercargo, say at $2522.83, at 15 *per* cent advance on said amount, payable at five months from this date, and to give a note or notes for the same, with an approved indorser." In compliance with this agreement, the defendant gave his notes for the sum mentioned; and in an action upon the notes, *the want of a legal consideration under the statute of frauds* was set up as defence, on the ground of *the want of mutuality in the written contract.* All around, in this case, both in the Circuit Court and in the Supreme Court of the United States, the want of mutuality was treated as being synonymous with the want of a consideration being shown; and in both courts it was held that the case was taken out of the statute, not by the note or memorandum in writing, which was unquestionably as sufficient as in Egerton *v.* Mathews, 6 East, 307; Stadt *v.* Lill, 9 East, 348, and in the vast number of cases according with them; but by the fact that the contract had been partially executed by the defendant's giving, and the plaintiff's receiving, the notes under the contract, by means of which the defendant was entitled to demand and receive the plaintiff's share of the cargo. As far at least as the course of the Circuit Court was concerned, it was there implied beyond the holding in the English cases, that not only must the consideration, but the mutuality also must be shown by the writing. In many of the modern cases, too, the idea seems to be incorrectly entertained that the consideration and the mutuality are synonymous things, causing much of the confusion and error on the subject which now surround it.

In the very late case (A. D. 1886) in Michigan, of Wilkinson *v.* Heavenrich, 58 Mich. 574, the defendants signed the following memorandum: —

"We promise and agree to pay [the plaintiff] wages or salary at the rate of $3500 a year for three years, from the second day of October, 1882, in consideration of his working for us for that length of time as cutter in our merchant tailoring department in the city of East Saginaw, Michigan. Payments to be made as earned, in such sums and at such times as he may desire."

As under the Michigan statute (Rev. Stat. of Mich. 1846, c. 81, § 86; Comp. L. of Mich. 1871, vol. 2, p. 1457, § 4702) the statement of the consideration does not have to appear in the writing, that question is eliminated from the case. And as neither in the writing signed by the defendants nor otherwise in the case does it appear that the plaintiff made a corresponding agreement with the defendants, nor proposed to do so until after the defendants had repudiated their *ex parte* undertaking, there was clearly no mutuality between them, and, therefore, no binding contract in the terms of the defendant's writing. And the court so held, viz., that where it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. We think the principle we have above in effect stated, viz., that where, under the statute, the consideration is not required to be in writing, or where, under the statute, it is required to be in writing and signed by the party to be charged, it is in the writing, but the writing is not signed by the other party, in an action on the contract against the party to be charged, the mutuality can be shown *dehors* the writing; and that this principle will remove much of the confusion on the subject that seems to exist in the cases. See the cases on the subject cited in this note; and see, further, Hopkins *v.* Logan, 5 M. & W. 241; Dorsey *v.* Packwood, 12 How. 126; Ewins *v.* Gordon, 49 N. H. 444; Haddeson Gas Co. *v.* Haselwood, 6 C. B. N. S. 239; Souch *v.* Strawbridge, 2 C. B. 808; Callis *v.* Bothamly, 7 W. Rep. 87; Utica, &c. R. R. Co. *v.* Brinckerhoff, 21 Wend. 139; Lester *v.* Jewett, 12 Barb. 502; Smith's Appeal, 69 Pa. St. 480; Tripp *v.* Bishop, 56 Pa. St. 428; Perkins *v.* Wadsell, 50 Ill. 217; Old Colony R. R. Corporation *v.* Evans, 6 Gray, 31; Williams *v.* Robinson, 73 Me. 186; Lees *v.* Whitcomb, 3 C. & P. 289; Sykes *v.* Dixon, 9 A. & E. 693; Krohn *v.* Bautz, 68 Ind. 277; Stiles *v.* McClellan, 6 Col. 89; Hall *v.* Soule, 11 Mich. 496; Scott *v.* Bush, 26 Mich. 418; Liddle *v.* Needham, 39 Mich. 147; McDonald *v.* Berwick, 51 Mich. 79.

By statute in England (The Mercantile Law Amendment Act, 19 & 20 Vic. c. 97), the consideration for the promise of one

some note or memorandum in writing of the contract, bargain, or agreement, signed by the party to be charged, the note or memorandum must be a note or memorandum of the whole contract; which writing, as stated by Tindal, C. J., in Laythorp *v.* Bryant,[1] is not perfect to show the agreement, unless in the body of it, or by necessary inference, it contain the names of the contracting parties, the subject-matter of the contract, the consideration, and the promise. This seems so obviously the only reasonable construction of the statute that it appears strange that there should be any conflict in the decisions on the subject. It would seem just as reasonable that the note or memorandum in writing of the contract, bargain, or agreement, should be good if it omitted the name of one of the contracting parties, or the subject-matter of the contract (which, on one side, is really the consideration), or the promise, as it would be if it omitted that equally essential thing, the consideration (that is, the price to be paid) of the bargain, contract, or agreement, without which an executory bargain, contract, or agreement really has no existence as an executory contract in the sense that it can be enforced; a mere *nudum pactum*.

The doctrine established by Wain *v.* Warlters[2] and Egerton *v.* Mathews[3] that to satisfy the requirements of the fourth and seventeenth sections of the statute, the note or memorandum in writing of the contract, bargain, or agreement, required to be signed by the party to be charged, must show, as an essential ingredient of such contract, bargain, or agreement, the consideration upon which it is based, has been virtually uniformly followed in England ever since, except so far as a portion of the fourth section has been affected by the Mercantile Law Amendment Act,[4] as shown in the previous note.[5]

to pay the debt of another does not now require to appear in writing. But this no less causes it to be required that the consideration, in fact, must be proved. Precisely on the same principle, then, before this act was passed, while, under the statute, to show what was the agreement, contract, or bargain, the note or memorandum in writing thereof must have shown, as a part of such agreement, contract, or bargain, what the consideration was; as both of the parties to the agreement were not required by the statute to show their mutuality by signing the writing, such mutuality would still be open to proof, as the consideration now is, *dehors* the writing. In accordance with the principles we have sought to establish in this note, it was held, in Reuss *v.* Picksley, L. R. 1 Ex. 342, affirming Warner *v.* Willington, 3 Drew. 523, and Smith *v.* Neale, 2 C. B. N. S. 67, that a proposal in writing, signed by the party to be charged, and accepted by parol by the party to whom it is made, — thus establishing the *aggregatio mentium*, — is a sufficient note or memorandum of the agreement to satisfy the 4th section of the statute of frauds, and, *semble*, also the 17th section. And see Colegrave *v.* Upcot, 5 Vin. Ab. 527; The Liverpool Borough Bank *v.* Eccles, 4 H. & N. 139; Mozley *v.* Tinkler, 1 C. M. & R. 692.

[1] 2 Bing. N. C. 735, 742.

[2] 5 East, 10.

[3] 6 East, 307.

[4] 19 & 20 Vic. c. 97.

[5] It is stated in 2 Sm. Lea. Cas., in note to Birkmyr *v.* Darnell, 1 Salk. 27, that the rule has been applied to the 17th section that it is sufficient if the *promise* of the party to be charged appears in the writing. And, to the same effect, it is stated in 3 Pars. on Con. 15, n., that in cases arising

Saunders *v.* Wakefield[1] followed and approved Wain *v.* Warlters.[2] There the defendant's promise to pay the debt of another

under the seventeenth section it has been held that the consideration need not be expressed. But these statements are most inaccurate. The authority upon which they both rely for these inaccurate statements is that of Egerton *v.* Mathews, 6 East, 307. And it is also so stated in Bennett's note to Benjamin on Sales. See 4th Am. ed., p. 243, note *u*, where in the margin it is said: "Doctrine that consideration must appear not extended to § 17," where no authority for the statement is cited. But in Egerton *v.* Mathews it expressly appeared that there was a consideration stated with sufficient clearness, the note or memorandum in writing showing that the price which the promisor was to pay was for Smyrna cotton which he was to receive. The consideration for his promise was as plainly stated as was the promise itself. And in the immense number of cases decided in England under the 17th section (very many of which we cite, *post*), where the note or memorandum in writing has been held sufficient, they all, expressly or impliedly, show the consideration for the signer's undertaking; and unless they show the whole contract, including, necessarily, the consideration, or what the party is to receive for his promise, the writing is insufficient. The apparent exception to this is where no price has been mentioned in the agreement, contract, or bargain, when a reasonable price will be implied as well as a part of the contract, as in the writing itself. But even this is only an apparent, and not a real, exception, as a price not having been named, the whole contract has been set out. But where a price has been agreed upon, this, as then an essential part of the contract, must appear in the writing; otherwise there is no note or memorandum in writing of the agreement, bargain, or contract, which, of course, means of the entire agreement, bargain, or contract. See authorities on these points cited in subsequent portions of this Part.

In Saunders *v.* Wakefield, 4 B. & Ald. 595 (which we state in our text), where it was claimed that Wain *v.* Warlters, 5 East, 10, had been overruled by *Ex parte* Minet, 14 Ves. 190; *Ex parte* Gardom, 15 Ves. 286; Stadt *v.* Lill, 9 East, 348; Fowle *v.* Freeman, 9 Ves. 351; Cotton *v.* Lee, cited in 2 Bro. Ch. 564, and Egerton *v.* Mathews, 6 East, 307; it was shown that in all these cases the consideration sufficiently appeared in the writing, or by a fair inference from it, signed by the party to be charged. The mistake which is often made is in confounding the mutuality with the consideration. The mutuality can only logically be shown by the writing, as we have, we think, made clear, *ante*, by its actual execution or signing by both the parties to the contract. But this evidently is not required by the statute, which only requires the writing to be signed by the party to be charged. But in the cases under the 17th section of the statute, and under, at least, one of the clauses in the 4th section, the consideration for which, for instance, the price is to be paid, is the subject of the contract which is to be received. And if this is not shown in the writing, there is, necessarily, no note or memorandum in writing of the contract, agreement, or bargain at all. Thus, in Fowle *v.* Freeman, 9 Ves. 351, which was under the clause in the 4th section to which we have above referred, relating to a contract or sale of lands, the note or memorandum in writing of the contract, which was signed by only the party to be charged, showed no mutuality; but as it showed a sufficient consideration the contract was sustained. The language there was: "I agree to sell to Mr. Fowle my estate, tithes, and manor at Chute Lodge, together with the woods, trees, and fixtures (except Cadley Cottage) for the sum of £27,000, upon the following conditions," naming them. This paper was signed by the defendant, but not by the purchaser, Mr. Fowle, yet it was held that, under the 4th section, the consideration sufficiently appeared in the writing, although the writing showed no mutuality. *A fortiori*, under the principle of the decision of Wain *v.* Warlters, 5 East, 10, and Egerton *v.* Mathews, 6 East, 307, such a memorandum would show a sufficient consideration to satisfy the 17th section of the statute. It is, in fact, in effect, the very description of a note or memorandum in writing which is usually signed to satisfy the 17th section of the statute, and which, in effect, is required (not only in England, and in the States here which purport to agree with the English decisions on the subject, but even, as we shall see, *post*, in the very States themselves which claim to repudiate such decisions) to be signed by the party to be charged, in order to satisfy the requirements of the 17th section of the statute.

Another thing which has led to much confusion in the matter has been the failure to notice the distinction between the different clauses of the 4th section itself. Thus, under the clause of the 4th

[1] 4 B. & Ald. 595.

[2] 5 East, 10.

simply was: "Mr. Wakefield will engage to pay the bill drawn by Pitman, in favor of Stephen Saunders." Here, clearly, is no consideration shown, nor is it a note or memorandum of a contract, bargain, or agreement, at all. Abbott, C. J., well dealt with the subject; and, in effect, on one of the grounds taken by us in the next preceding note; and also directed attention to the important fact that the words of the fourth section, special promise, agreement, contract, sale, some of which have been relied on to show that the statement in the writing of a consideration is not necessary under the statute, are all words which imply the necessity of the consideration being shown, without which a special promise, agreement, contract, or sale is simply *nudum pactum*, or can have no existence.[1]

section relating to the sale of lands, like, as we have shown above, under the 17th section, as illustrated by Fowle *v.* Freeman, 9 Ves. 351, and Egerton *v.* Mathews, 6 East, 307, a writing signed, "I agree to sell my estate (specifying it) for £27,000;" or "We agree to give Mr. Egerton 19*d.* per pound for 30 bales of Smyrna cotton," clearly shows in each of these cases a consideration, but in neither of them the mutuality, which, as we have shown, can be proved *dehors* the writing. But in Wain *v.* Warlters, 5 East, 10, where the writing was "I will engage to pay you £56 and expenses, on bill that amount on Hall," and in analogous cases, there is neither mutuality nor consideration shown. The existence of the debt is no consideration for the mere promise of a third party. To make a consideration as to him is entirely different from where he is buying land under the 4th section or goods under the 17th. In these latter cases the land or goods he is expressly or impliedly to receive is the consideration for the price he is expressly or impliedly to pay. But in the case of the promise of a third party to pay the debt of another, as in Wain *v.* Warlters, the only implication that arises from such promise is that the promisee is to receive such debt (which is no consideration to the promisor), not that he is to give time or forbear to sue, or do anything else that would be a consideration, even supposing there was no question of a writing in the matter at all. Hence, as at common law, the mere promise of a party to pay the debt of another is *nudum pactum* for want of a consideration (see Cook *v.* Wright, 1 B. & S. 559; Sowerby *v.* Butcher, 2 Cr. & M. 368; Edwards *v.* Baugh, 11 M. & W. 641; Cooper *v.* Parker, 15 C. B. 822; Longridge *v.* Dorville, 5 B. & Ald. 117; Atlee *v.* Backhouse, 3 M. & W. 633; Maples *v.* Sydney, Cro. Jac. 683; Semple *v.* Pink, 1 Ex. 74; Oldershaw *v.* King, 2 H. & N. 517; Fish *v.* Richardson, Cro. Jac. 47; Pitt *v.* Bridgwater, Hard. 74); the mere promise in writing, signed by the party to be charged, to pay the debt of another, shows no consideration, and is in itself *nudum pactum*, and is no note or memorandum of a bargain, contract, or agreement to satisfy the statute. Obviously, as regards the necessity for the consideration of the contract to be shown by the writing, to satisfy the statute, it is as much required under the 17th section of the statute as under the 4th. The statements which we have quoted to the contrary are as singularly remarkable as they are incorrect. See Ide & Smith *v.* Stanton, 15 Vt. 685, 695, where the opposite error of that which we have been considering in this note is committed by the Supreme Court of Vermont. It is there held that, under the 17th section, all the essential elements of the contract, including, of course, the consideration, without which the undertaking is a mere *nude pact*, must be shown in the writing under the term "bargain" in the section, but that the consideration need not be shown under the certainly not less technical term "agreement" of the 4th section. The court say: "Since a stipulated price is to enter into the legal contemplation of *a bargain*, we could not doubt, even in the absence of more direct authority, that when the statute came to require written evidence of the bargain *it intended that the price* [which is the consideration for the goods, wares, or merchandise purchased], *like other essential terms of the contract*, should be proved by such evidence. This conclusion, however, is not left to rest upon mere inference from the statute, since it is abundantly confirmed by the decisions both at law and in equity." See *infra*, where the Vermont case is fully examined, and its fallacy exposed.

[1] In doing so Abbott, C. J., says: "I assent to the argument which has been

We have already pointed out that there is no opposition, in fact, between the holding in Wain *v.* Warlters[1] and Egerton *v.* Mathews,[2] the former showing no consideration at all, and the latter showing that the price the defendants were to pay the plaintiff was for the cotton which they were to receive from him. Thus, although the memorandum or note in writing, not having been executed, as it is not required to be by the statute, by both the parties to the contract, but only by the party or parties to be charged, did not show the *mutuality* necessary to make the contract binding on both; yet mutuality must not, as, we think, we have abundantly made appear, be confounded with the essentially different thing, the *consideration* for the signer's promise; which, if not shown, then — outside of the question of mutuality altogether, which really and logically can only be shown by the writing, by its actually being signed by both, which the statute does not require — clearly, merely an unsupported promise is shown, and there is no note or memorandum in writing of any contract, bargain, or agreement at all. The inference from the signed writing in Egerton *v.* Mathews, is, that the price the defendants promise to pay the plaintiff was *for* the thirty bales of Smyrna cotton which they were to receive from him, and the court held expressly that this satisfied the requirements of the statute to show "the bargain" between the parties. Unless by fair inference from the writing the whole bargain appeared, namely, what the signer was to do and for what he was to do it, then there was no bargain shown. But if both of those things were shown, then a bargain was shown; both sides of it, namely, that the price the defendants

pressed upon us that the word 'agreement' in the latter part of the 4th section of the statute of frauds is to be construed to be a word of reference, and that it refers to words contained in the former part of the section. Now, in the former part of the section, we find the words special promise, agreement, contract, or sale. I read, therefore, the latter part of the clause as if all those precedent words were incorporated in it, together with the word agreement, and then it would stand thus: 'unless the agreement, special promise, contract, or sale upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed,' etc. It is then to be considered, with reference to the common law, whether there can be an agreement, special promise, contract, or sale which would be valid in law unless a consideration appeared for it. Now, at common law, a promise to pay the debt of another, if made simply, and without a good consideration for it, would be void. So also a promise by an executor to answer damages out of his own estate would be void if made without consideration. It is impossible to suppose that the statute of frauds, which was intended to correct the common law, can apply to cases in which, at common law, when the promise was not in writing, there was previously no remedy. Now, at common law, no action would lie unless there was some specialty or 'peculiarity' in the promise. It is impossible to conceive how there can be such specialty unless the consideration for the promise be stated. For it is the consideration which makes it a special promise. The consideration, therefore, must have been in the contemplation of the legislature when they used the words special promise. If so, it will follow that a party is not entitled to recover unless the written agreement contain some specialty, which cannot be unless it contain the consideration for the promise."

[1] 5 East, 10.

[2] 6 East, 307.

promised to pay was the consideration for the goods he was to receive, and the goods he was to receive were the consideration for the price which he agreed to pay. Thus Lord Ellenborough in his observations shows that the bargain, the whole bargain, both sides of the bargain, and, therefore, the mutual considerations to constitute the bargain, were shown by a writing expressing that A. was to pay B., 19*d.* per pound *for* (one for the other — the mutual considerations) thirty bales of Smyrna cotton (mutual considerations. clearly, here!). Thus, Lord Ellenborough observed, the italics being his own, — "That the words of the statute were satisfied, if there were 'some note or memorandum of the *bargain*, signed *by the parties to be charged by such contract.*' And this was a memorandum of the bargain, or at least, of so much of it as was sufficient to bind *the parties to be charged therewith*, and whose signatures to it is all that the statute requires."[1] That is, the whole bargain is shown, outside of the consent of the other party to it, or the mutuality, which the statute does not require to be shown by the writing. But, outside of that, the bargain, the whole bargain is shown; that is, what the defendants were to give *for* what they were to receive, the one being a "*consideration*" for the other; the price to be paid, the consideration for the goods to be received; the goods to be received, the consideration for the price to be paid.

We dwell on this, because we think (1) that it is conclusive; and (2) if so, then we think, on principle, it disposes of all the cases in Connecticut, Maine, Massachusetts, Missouri, North Carolina, Ohio, or elsewhere, where it has been held that under such sections as those of the fourth or seventeenth sections of the English Statute of Frauds, the consideration for the promise of the party to be charged does not have to be shown in the note or memorandum in writing of the contract, bargain, or agreement, required, respectively, by these sections of the statute, to be signed by him. Because, we think, that, in none of the decisions

[1] It seems to us clear that Lord Ellenborough in Egerton *v.* Mathews, 6 East, 307, made two mistakes: the first in granting a nonsuit where the requirements of the statute were fully met, and a note or memorandum in writing of the sale, bargain, contract, or agreement, signed by the parties to be charged by such contract, was in evidence; the second where, in granting a rule *nisi*, he assumed that there was any distinction as to the note or memorandum in writing required under the different sections. It will be noticed that, on the argument of the rule, the court were of opinion that the action was sustainable under the 17th section of the statute, nothing there being intimated by the court that it would not also have been good under the 4th section. And the language of Lord Ellenborough in the judgment, making the rule absolute, shows, we think, that outside of the question of mutuality being, under the term "agreement," necessary to be shown by the writing, under the 4th section, which idea, we think, seemed to embarrass him, that he considered the note or memorandum in writing as sufficient under the one section as the other. His language clearly indicates as much. And, in fact, in Egerton *v.* Mathews, 6 East, 307, aside of the memorandum not having been signed by the other party to the contract, it showed the entire contract.

in any of these States or elsewhere, is it for a moment so absurdly contended, that, in a contract for the purchase of goods for a specified price, within the clause of the seventeenth section of the statute we are considering, a note or memorandum in writing which omits on the one hand to state what is the subject of the purchase, or, on the other hand, what is to be paid for it, would be a note or memorandum of the contract, bargain, or agreement to satisfy the statute. Such a memorandum would simply show nothing. Then, is not that which is to be got, as in Egerton *v.* Mathews, the consideration for that which is to be given; the goods for the price, the price for the goods? And then, *semble*, as the price to be paid is the consideration for the goods to be received; of course, if the price specified has to be shown, the consideration, of necessity, is and must be shown. Where there is no price stated, then a reasonable price is presumed, and so, therefore, is the consideration. But, in either case, the whole contract is shown, and, in the exceptional case, the consideration is implied.[1]

We have already fully pointed out that under one of the clauses in the fourth section of the act, that relating to the sale of lands, the consideration, the price to be paid for the lands, is shown in the note or memorandum in writing, in the same manner as it usually is under the seventeenth section; and the statement of the price, simply, in either of these cases, to be paid for specific lands or specific goods, shows, reciprocally, the consideration between the parties, or the whole contract, bargain, or agreement. And, although, as we have shown, it is stated in Smith's Leading Cases, in England, and in Parsons on Contracts, in this country, and in the American Notes to Benjamin on Sales, as their unsound deduction from Wain *v.* Warlters,[2] and Egerton *v.* Mathews,[3] that while a consideration is necessary to appear in the writing as to contracts or agreements, under the fourth section, it is not necessary that it should so appear in the writing as to agreements, contracts, or bargains, under the seventeenth section; we have corrected this important and very glaring error, and have shown

[1] So, also, *in the absence of an express stipulation*, as to the time of payment, the presumption of law is that the payment is to be in cash. Fessenden *v.* Mussey, 11 Cush. 127. So, therefore, the implication, under the holding in this case is, that if a part of the consideration is, as to the terms of payment, that time is to be given, this, as a part of the consideration, must be expressed in the note or memorandum in writing, or the statute is not satisfied. And this, note, is in Massachusetts, where the leading case is to be found, which we examine, *infra*, of Packard *v.* Richardson, 17 Mass. 122, which holds that the consideration, to satisfy the statute, is not required to be stated in the note or memorandum in writing of the contract, bargain, or agreement, which is required to be signed by the party to be charged. We state the case of Fessenden *v.* Mussey, 11 Cush. 127, *post*, in connection with Packard *v.* Richardson, 17 Mass. 122.

[2] 5 East, 10.

[3] 6 East, 307.

that it is equally as necessary to express the consideration in the writing under the phraseology in the seventeenth section as under that of the fourth section.

The cases, on the other hand, which, in this country, hold that the statement of the consideration is not necessary to be shown in the writing, fall into the opposite error of holding, in effect, that the consideration must appear in the writing under the seventeenth section, but not under some clauses of the fourth section. As intimated above, we know of no case in this country which holds such an absurdity as that a contract, agreement, or bargain is sufficiently shown in a writing by stating that a price is to be paid, without stating the consideration for which it is to be paid, namely, the specific goods, wares, or merchandises which are the subject of the contract, and which are to be received *for* (or in consideration of) the price which is to be paid for them. So, therefore, the statement, as in Egerton *v.* Mathews,[1] in a signed writing, "I agree to give B. 19*d.* *per* pound, *for* thirty bales of Smyrna cotton," shows, outside of the mutuality, the whole contract, *i. e.*, that the goods are purchased for the price to be paid; what the signer is to do, and for what (the consideration) he is to do it. But under one of the clauses of the fourth section, such as that of a promise of one to pay the debt of another, as in Wain *v.* Warlters,[2] "I, A., agree to pay B., C.'s debt;" there no contract is shown at all. It is simply shown that there is an unsupported promise; the other part of the contract, bargain, or agreement, to forbear to sue, to give time, etc., neither appearing expressly or inferentially, and therefore the promise is simply *nudum pactum*. "I, A., agree to pay B., 19*d.* per pound for thirty bales of cotton," is one thing; shows the whole contract, and satisfies the statute. "I, A., agree to pay B., C.'s debt," is quite another; shows no contract or agreement, and, therefore, such a statement is no note or memorandum in writing of any agreement, bargain, or contract.

It is the failure to notice this distinction that has led to the error in those courts which have thus, in effect, held, as indeed has, as we have shown, been expressly held in Vermont, that under the seventeenth section, the consideration, the whole contract, must be shown; while, under, at least, some of the clauses of the fourth section (for, surely, they cannot so hold with reference to the clause as to contracts or sales of land, any more than they can as to contracts of sale under the seventeenth section), the mere naked, unsupported promise is necessary to be shown, without showing the bargain, contract, or agreement at all.[3]

[1] 6 East, 307.
[2] 5 East, 10.
[3] Browne, on the Statute of Frauds (see secs. 381, 381*a*, *et seq.*), with less than

Whatever idea Lord Ellenborough may have entertained in Wain *v.* Warlters,[1] and Egerton *v.* Mathews,[2] as to any distinc-

his usual clearness, evidently having some idea of the absurd contradiction in which the courts of those States are involved, that hold that merely the naked, unsupported promise of the party signing the note or memorandum in writing is good to satisfy the requirements of the statute, at least as to some of the clauses in the 4th section; but that as to "bargains" under the 17th section, the note or memorandum must express the entire contract, and, therefore, of course, the consideration, saw no means of escape from the difficulty except by assuming that the price and the consideration are essentially different things. As we have shown above, the price to be paid is to be paid *for* the goods to be received, and, therefore, a note in writing showing this, and showing by and to whom the price is to be paid, and from and to whom the goods are to be received, shows the entire contract, except the mutuality, which latter, the statute does not require to be shown by the writing. The price is to be paid *for*, or in consideration of the goods to be received; the goods are to be delivered *for*, or in consideration of the price to be paid. Browne, for his untenable distinction, relies on Saunders *v.* Wakefield, 4 B. & Ald. 601, and Egerton *v.* Mathews, 6 East, 307, both of which cases we have fully examined, and neither of which sustains his position, as, in fact, he himself shows. Referring to Saunders *v.* Wakefield, he says, there "The action was on a written guaranty; and the question was whether it was sufficient without having the consideration apparent on its face, and the judges concurred that it was not; but Mr. Justice Bayley, in illustration of his position, went on to make this remark: 'I find, too, that the word "agreement" in this clause is coupled with "contracts of marriage and for the sale of lands;" now, in those cases, *it is clear that the consideration must be stated.* For it would be a very insufficient agreement to say: "I agree to sell A. B. my lands," *without specifying the terms or the price.*'" Here, Bayley, J., expressly says, that *the consideration* must be stated, which, in his very next words, he shows are *the terms and the price.* Thus, to take his own case, extended to meet his position: "I agree to sell A. B. my lands for £50, payable on the first of June next," shows the entire contract which the statute requires; meets the view of Mr. Justice Bayley and the rest of the court; and is a memorandum in accord with the well-decided cases on the question. It shows the consideration and the entire contract, except the mutuality.

The error Mr. Browne makes is in confounding the mutuality with the consideration. Thus, he says: "The statement of the price in the memorandum of a contract of sale is not always to be regarded in the same light as the consideration of the contract. When an action is brought upon a contract within the statute, the memorandum must contain some designation of the parties contracting, and the terms of the contract; which last, in the case of a contract of sale, *would include the price*, if any had been stipulated. [That is, the *entire* contract, except the mutuality.] It need not contain or state any promise to perform or allegation of performance, although such promise or performance constitutes the only consideration for the engagement upon which the defendant is sought to be charged. In Egerton *v.* Mathews, for example, it did not appear in the memorandum whether or not the plaintiffs ever had delivered, or agreed to deliver, any cotton, [*i. e.*, the *mutuality* did not appear], yet delivery, or a promise to deliver, was evidently the only consideration for the defendant's promise to pay." And, proceeding, Browne himself shows his own incorrectness. He says: "The decision of Egerton *v.* Mathews was certainly correct, *because all the terms of the bargain were there presented in the writing;* not because the word 'bargain' imports a consideration any less than the word 'agreement.'" This is entirely correct. "*All the terms of the bargain* were there presented in the writing," exactly as Mr. Browne states, — the price to be paid by the buyer to the seller *for* (the consideration) the goods. So, proceeding, Browne, in the following, commits a still more glaring error: "On the other hand, as Mr. Justice Bayley says: 'It would be a very insufficient agreement to say, "I agree to sell A. B. my lands," without specifying the terms or the price,' because the price, which is an element of the sale, is not stated; and not because a memorandum of an agreement to do a thing, must necessarily show the motive or inducement for making it." Mr. Browne makes a further mistake here in misunderstanding the meaning of "consideration." Primarily, consideration means deliberation, thought; and, therefore, executing a sealed instrument, as

[1] 5 East, 10.

[2] 6 East, 307.

tion in the note or memorandum, whether as to the consideration or mutuality, under the fourth and seventeenth section of the

so formal an act, implies deliberation; thought, consideration. But the primary meaning of consideration in law is now very much an obsolete matter. Price, too, as well as a specialty, implies consideration.

While, as "a motive or inducement" for making a contract, a promise is a good consideration for a promise; as a general rule, anything that is a detriment to the promisee, or a benefit to the promisor, is a consideration for the promise. Hence, a price to be paid is a good consideration in a bargain, contract, or agreement for goods to be received. And goods to be received under a contract is a good consideration for a price to be paid for them. Hence, when, as in Egerton *v.* Mathews, 6 East, 307, it sufficiently appears, by the note or memorandum in writing, signed by the party to be charged, that goods are to be received *for* a price which is to be paid; there, clearly, the bargain, contract, or agreement, including the consideration, is wholly shown, outside of the mutuality, and satisfies the statute. The consideration in a contract is that which is done or to be done, or given or to be given, by one, for that which is done or to be done, or given or to be given, by the other. Hence, to show the consideration, the whole contract must be shown. And if the terms or conditions are omitted, the whole contract, the whole consideration, is not shown. The "motive or inducement," put by Mr. Browne as the consideration, is not so at all. The motive or inducement which leads to the contract, unless crystallized into and made a part of the contract, does not affect the contract, or form any part of the consideration for the undertaking of one to do or not to do with or for another some particular thing. Neither, as we have shown, is the mutuality the consideration. The mutual assent — the *aggregatio mentium* — is the union of the minds of the contracting parties; the mutuality showing the intention of the parties, and is absolutely essential to the formation of a contract. But what the contract is, is shown by its terms, — all that which is given or to be given, or done or to be done, by one, being *the consideration* for all that is given or to be given, or done or to be done, by the other. Hence, the question has often arisen, where the consideration in a contract has consisted of different things, whether these, as the consideration for the other reciprocal part of the contract, go to the very essence of the contract, so as to stand or fall with the contract in its entirety. See Cutter *v.* Powell, 6 T. R. 320; Morton *v.* Lamb, 7 T. R. 125; Glazebrook *v.* Woodrow, 8 T. R. 366; Chanter *v.* Leese, 4 M. & W. 295; 5 M. & W. 698; White *v.* Beeton, 7 H. & N. 42; Head *v.* Baldrey, 6 A. & E. 459; Stavers *v.* Curling, 3 Bing. N. C. 355; Franklin *v.* Miller, 4 A. & E. 599; Glahohn *v.* Hays, 2 M. & G. 257; Scott *v.* Parker, 1 Q. B. 809; Wilks *v.* Smith, 10 M. & W. 355; Atkinson *v.* Smith, 14 M. & W. 695.

In Noy's Maxims, c. 42, pl. 87, 9th ed. 205, it is said that, "In all bargains, sales, contracts, promises, and agreements, there must be a *quid pro quo*;" *i. e.*, an equivalent, or consideration reciprocally between the parties. It will be noticed that this very old writer employs the various terms which are used in the statute of frauds, — bargains, sales, contracts, promises, and agreements, — showing that, equally with one as with the other, a consideration is necessary. Treating them all as contracts, Noy also says: "It is a general learning that there must be in every contract, *quid pro quo*, viz., some valuable consideration between the parties, to be paid or performed, either presently or at a day to come, or else some earnest to be given presently; otherwise the contract is void; for *ex nudo pacto non oritur actio.*" Noy's Max., "The Dialogue," pl. 44, p. 348.

See Sievewright *v.* Archibald, 17 Q. B. 103, where the consideration was shown in the note or memorandum in writing, but as the bought and sold notes differed, it was held that there was no mutuality, and, therefore, no sufficient note or memorandum in writing of the contract, bargain, or agreement, signed by the party whom it was sought to charge. See further, as to mutuality, Gaunt *v.* Hill, 1 Stark. 10, *per* Lord Ellenborough; Newberry *v.* Armstrong, 1 Moo. & M. 389; Knight *v.* Crockford, 1 Esp. 190, 193.

But, as will be seen by the remarks which Browne has quoted, Mr. Justice Bayley's position in Saunders *v.* Wakefield, 4 B. & Ald. 601, is misstated. What, in effect, he says, is: Contracts of marriage and for the sale of land, clauses in the 4th section, require "*that the consideration must be stated. For* [that is, therefore,] it would be a very insufficient agreement to say, 'I agree to sell A. B. my lands,' without specifying the terms or the price;" and, therefore, the terms and the price, as the consideration, "must be stated." This language is used by Bayley, J., with inference to the 4th section, but his position is equally applicable

statute, it is evident that he did not maintain the distinction, which, as we have shown, *ante*, we think he really abandoned in

to the 17th section. As his judgment is a valuable one, and entirely accords with our view as to the law on the subject involved, we set it out here in full : —

"The object of this statute," says Bayley, J., in Saunders *v.* Wakefield, 4 B. & Ald. 595, 600, "which was a most useful act, was to prevent frauds and perjury, and it ought to be construed so as most effectually to accomplish that object. The 4th section contains several cases in which it is provided that no action shall be brought. One case is of a special promise by an executor to answer damages out of his own estate ; another of a special promise to answer for the debt, default, or miscarriage of another person. Now, at common law, in order to make a person chargeable in such cases, there must be a special consideration for the promise, either moving to the party promising, or from the party in whose favor the promise is made. Then the statute provides that a party shall not maintain an action in such cases, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing ; and I think, therefore, that that memorandum must include a statement of the consideration for such agreement. A contrary decision would be most mischievous. For if we were to hold that the consideration might be omitted in the written agreement, we should immediately let in fraud and perjury. The consideration may be either past or future ; and if the written agreement contain only a promise to pay, the party who relies upon it may then introduce parol evidence of a consideration which, perhaps, was never intended by the parties, and so a door would be open to fraud and perjury. Suppose the real consideration for the special promise is something in future to be done. If that be not reduced into writing, the plaintiff may state in his declaration a past consideration, and bring parol evidence to prove that fact. I find, too [here notice now the mistake made by Browne in his "Statute of Frauds," to which we have referred. The whole argument of Bayley, J., is that *a consideration* must be shown, and he thus illustrates it], that the word 'agreement' in this clause is coupled with 'contracts of marriage, and for the sale of land ;' *now in these cases it is clear that* THE CONSIDERATION *must be stated.* FOR it would be a very insufficient agreement to say, 'I agree to sell A. B. my lands,' without specifying the terms or the price [*i. e.*, which are *the consideration*], and if those [*i. e.*, the consideration] could be supplied by parol evidence, we should let in all the mischief against which the statute meant to guard, viz. of having important parts of the contract proved by parol evidence. Without, therefore, going beyond the words to this particular case [*i. e.*, the clause relating to the promise to pay the debt of another], I think that they import that there must be some specialty in the transaction, and that they mean that the special promise should be in writing, incorporating in it its consideration, which alone makes it binding. This seems to me to be the result without any reference to authorities on the subject. But in addition to this, we have the unanimous opinion of this court in the case of Wain *v.* Warlters, 5 East, 10 ; a case which was well considered at the time by four most able judges. Upon principle and authority, therefore, I think that we ought to decide in favor of the defendant ;" *i. e.* that in an action "upon any special promise to answer for the debt, default, or miscarriages of another person," there must be some note or memorandum in writing of such "special promise" or agreement, "signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized ;" which writing must show the whole of the common-law "special promise" or agreement, which necessarily includes its very essence, the consideration. In a much earlier case than Wain *v.* Warlters, 5 East, 10, viz., Pillans *v.* Mierop, 3 Burr. 1663, 1666 (A. D. 1765), the view as to the necessity of the writing showing the consideration for a special promise to pay the debt of another, was, in effect, expressed by Wilmot, J., where he says : "The mere promise to pay the debt of another, without any consideration at all, is *nudum pactum ;* but the least spark of a consideration will be sufficient. It seems almost implied that there must be some consideration ; but if there be none at all, it is *nudum pactum. The statute must mean such a special promise as would have supported an action.*" And, therefore, that the consideration for the special promise must appear by the writing. And see in *Dom. Proc.*, Rann *v.* Hughes, 7 T. R. 350, n.

It does certainly seem very absurd that any court could hold, as the courts in a number of the States in this country have done, that a simple, unsupported promise of A. to pay B. the debt of C., without showing that such a promise is on some consideration stated in the statutory writing required ; and yet that the

his judgment in the latter of these cases. Thus, in Stadt *v.* Lill,[1] which was an action on the case for the breach of a guaranty for the payment of goods delivered by the plaintiff to a third party, the guaranty was in the following form: "I guarantee the payment of any goods which J. Stadt delivers to I. Nichols;" which was signed by the defendant. On the trial it was objected that the guarantee was void by the fourth section of the statute, which

case, under another clause of the same section, put by Bayley, J., of "I agree to sell A. B. my lands, without specifying the terms or the price," would be simply *nudum pactum*, and void for want of a specified consideration to support such *a mere naked promise*, — not the common-law "special promise." In the same way the decisions of those courts are, of course, equally absurd which hold that the statement in writing of the mere naked, unsupported promise, under the 4th section, of one to pay another the debt of a third, is good, if made in writing, without anything further; and yet that the contract, bargain, or agreement, under the 17th section, must have set out in it the names of the parties, the subject-matter of the purchase and sale, as well as the price and terms, — the consideration. And yet, even still more absurd, while so continually holding as last above stated, with reference to contracts, bargains, or agreements, under the 17th section, to be nominally claiming to hold that in no case, either under the 4th or the 17th section of the statute, is it necessary that a statement in writing of the consideration of the contract, bargain, or agreement should appear; and yet that, as we will clearly show directly, is exactly what they do.

It is little wonder that, embarrassed by such contradictions and absurdities, such respectable writers as Mr. Smith in England and Professor Parsons in this country should misunderstand and mistake the English decisions, to the effect that the consideration must appear in the writing where the contract is under the 4th section, but need not where it is under the 17th, — a position which, as we have shown, is entirely untenable. Or, on the other hand, that another equally respectable writer, Browne, on the Statute of Frauds (see §§ 381, 381 *a*, *et seq.*), unable on any possible principle to reconcile the decisions of the courts in this country, which expressly hold that, at least under some of the clauses of the 4th section, the consideration need not appear in the writing necessary under the statute; and yet, with regard to "bargains" under the 17th section, that *the entire contract* must appear, — the parties to the contract, its subject-matter, the price, and the terms; that is, *the entire contract*, including, of course, the consideration, — should be completely at sea with reference to what such cases do hold. And, therefore, while admitting, as he does (§ 381 *a*), that "the decision of Egerton *v.* Mathews, 6 East, 307, was certainly correct, *because all the terms of the bargain were there presented in the writing;*" and quoting Bayley, J., who shows unanswerably that, under a clause in the 4th section, which, in effect, on the question, is identical with the "bargains" provided for in the 17th section, where, as Bayley, J., shows, "it would be a very insufficient agreement" if the consideration did not appear; and yet Mr. Browne seems to think — and he is quite justified in doing so from the absurd and contradictory decisions on the subject in a number of the States in this country — that, although it is necessary under the decisions in such States that "*all the terms of the bargain*" should be "presented in the writing," including parties, subject-matter of the purchase, price, and terms, yet *the consideration* need not be so presented; that is, that the subject-matter, which is the consideration for the price, must be set forth in the writing; and that the price and terms, which are the consideration, in the contract, bargain, or agreement for the goods, wares, and merchandises purchased must also be stated in it, but that "the consideration" need not be. And we then have the contradictory, irrational conclusion that the consideration *must* appear in the writing; but yet the consideration *need not* appear in the writing. This is the logical result of the holding in those cases, and of Mr. Browne's logical deduction from them. The only possible explanation of such contradictions is that they have mistaken *the consideration*, which, under the language of the statute, must always appear in the writing as an essential part of the bargain, contract, or agreement; for *the mutuality*, which is also necessary to constitute a contract, but which the statute does not require should be shown in the writing, but may appear *dehors* the writing.

[1] 9 East, 348.

avoids any promise to answer for the debt of another unless the *agreement* be in writing, etc., and Wain *v.* Warlters,[1] and Egerton *v.* Mathews,[2] were relied on, as holding that the word "agreement" included the consideration for the promise as well as the promise itself. It was claimed that no consideration for the promise was stated in the memorandum. Lord Ellenborough held, in entire consistency with the holding of the court, including himself, in Egerton *v.* Mathews,[3] that the stipulated delivery of the goods to Nichols was a consideration appearing on the face of the writing, and when the delivery took place the consideration attached. This ruling was sustained by the whole court. So, it is clear, that under Egerton *v.* Mathews,[4] decided under the seventeenth section, and Stadt *v.* Lill,[5] decided under the fourth section, the same construction is given in England to the two sections of the statute as to what the note or memorandum in writing is to contain. The statements therefore, in Smith's Leading Cases, in Parsons on Contracts, and in the American Notes to Benjamin on Sales, referred to *ante*, in effect, that, under the seventeenth section the consideration need not be expressed, are entirely inaccurate. The consideration, on which the promise was sustained, was even more clearly and unmistakingly expressed in Egerton *v.* Mathews,[6] under the seventeenth section, than it was in Stadt *v.* Lill,[7] under the fourth.[8]

[1] 5 East, 10.
[2] 6 East, 307.
[3] *Ibid.*
[4] *Ibid.*
[5] 9 East, 348.
[6] 6 East, 307.
[7] 9 East, 348.
[8] See also, in Phillips *v.* Bateman, 16 East, 356, 372, *per* Lord Ellenborough, where the actual and consistent holding in Wain *v.* Warlters, 5 East, 10; Egerton *v.* Mathews, 6 East, 307; and Stadt *v.* Lill, 9 East, 348, is sustained. For further English cases on the subject, see James *v.* Williams, 3 N. & M. 196; Cole *v.* Dyer, 1 C. & J. 461; Newbury *v.* Armstrong, 6 Bing. 201; Cole *v.* Duffield, 1 J. B. Moore, 252; Jenkins *v.* Reynolds, 3 Br. & B. 21; s. c. 6 B. Moore, 106; *Ex parte* Minett, 14 Ves. 189; *Ex parte* Gardom, 15 Ves. 286; Warrington *v.* Furber, 6 Esp. 89; Russell *v.* Mosely, 3 Br. & B. 211; 6 B. Moore, 521; Clancy *v.* Piggott, 4 N. & M. 496; Buckmyr *v.* Darnall, 2 Ld. Raym. 1085; Jones *v.* Cooper, Cowp. 227; Matson *v.* Wharam, 2 T. R. 80; Sweet *v.* Lee, 3 M. & G. 452; Raikes *v.* Todd, 8 A. & E. 846; Haigh *v.* Brooks, 10 A. & E. 309, 334; Allen *v.* Bennet, 3 Taunt. 169; Martin *v.* Mitchell, 1 Jac. & W. 426; Palmer *v.* Scott, 1 Russ. & M. 391; Goss *v.* Lord Nugent, 5 B. & Ad. 58; Morley *v.* Boothby, 3 Bing. 107; Bainbridge *v.* Wade, 16 Q. B. 89; Hawes *v.* Armstrong, 1 Bing. N. C. 761; Cole *v.* Dyer, 1 Cr. & J. 461; Ryde *v.* Curtis, 8 Dow. & Ry. 62; Powers *v.* Fowler, 4 E. & B. 511. In Bainbridge *v.* Wade, 16 Q. B. 89, 99, Coleridge, J. said: "There is no doubt as to the general rule which results from putting together Wain *v.* Warlters, 5 East, 10, and Stadt *v.* Lill, 9 East, 348. There must be an agreement or a memorandum of one, to satisfy the statute of frauds; and the consideration is a part of the agreement. It must, therefore, appear on the instrument, either in express terms or by implication, such as to leave no ambiguity. It is not to be supplied by extrinsic evidence." But it is permitted to show, by parol, in what sense the words are used, to show the situation of the parties. Bainbridge *v.* Wade, 16 Q. B. at p. 97, *per* Lord Campbell, C. J.

In Newbery *v.* Armstrong, 1 Moo. & M. 389, the following note in writing was signed by the defendant: —

"To Mr. J. Newbery, — Sir, I, the undersigned, do hereby agree to bind myself to be security to you for Mr. John Corcoran, late in the employ of Mr. Pearson, for whatever (while in your employ) you may intrust him with, to the amount of

In Stead *v.* Dawber,[1] which was a case under the seventeenth section of the statute, it was held that, in a written contract under that section, to deliver, on a certain day, goods of a fluctuating value, to be paid for by bill at three months from delivery, the time of delivery is of the essence of the contract, and any agreement to substitute another day must be in writing. It was not for a moment contended in this case that there was any distinction as to the necessity of the consideration appearing in the note or memorandum of the contract in writing, when the contract was under the seventeenth section, any less than when it was under the fourth section. But it was, in fact, conceded all around, that *all* the essential parts of the contract must appear in the writing. And the court held accordingly, that a contract within the Statute of Frauds, without any distinction as to the fourth or seventeenth sections, cannot be proved *as to any essential part of it*, and, therefore, clearly not as to its very essence, the consideration, by parol testimony; for to allow such a contract to be proved partly by writing, and partly by oral testimony, would let in all the mischiefs which it was the object of the statute to exclude.

So, also, under the seventeenth section, unless the whole conditions of the sale appear in the writing, there is no memorandum of the bargain. In Hinde *v.* Whitehouse,[2] where the auctioneer signed the name of the purchaser of goods to the catalogue of

£50, in case of default to make the same good."

It was contended for the defendant that there was no consideration for the defendant's promise, unless it was that the plaintiff was bound to take Corcoran into his service; that this did not appear in the agreement, according to which he might either be at liberty not to do so at all, or he might already have done so; that there was *no mutuality* in the written agreement, and that, consequently, it was not binding. Wain *v.* Warlters, 5 East, 10; Saunders *v.* Wakefield, 4 B. & Ald. 595, and Lees *v.* Whitcomb, 5 Bing. 34, were relied on. But the court held that the consideration was sufficiently shown, and that it was not necessary to show mutuality by the writing. Tindal, C. J., in delivering the judgment, said: "I think you lay down your rule too largely. The written agreement must show the consideration, but it need not show 'mutuality.' If you can by reasonable construction collect from it the consideration, it is enough. In this case it rather appears from the words of the contract, mentioning Corcoran as lately in the employ of another master, that he was not at the time of its date taken into the plaintiff's service. If so, it is clear that the plaintiff's doing so was the consideration of the defendant's promise; and if by fair construction we can, as it were, spell out from the contract that it was so, it is enough. The doctrine contained in the cases referred to has been carried to the extreme edge of the law." Precisely the same doctrine is applicable to Egerton *v.* Mathews, 6 East, 307, under the 17th section. And see Kennaway *v.* Treleaven, 5 M. & W. 498; Bastow *v.* Bennett, 3 Camp. 220. But where the declaration stated the future supply of goods as the consideration, the court held that the consideration, either in express words or by necessary implication, must appear on the face of the instrument, and that the following memorandum, signed by the defendant, was insufficient to show the consideration alleged in the declaration: "Mr. Price, — I will see you paid for £5 or £10 worth of leather on the 6th of December, for Thomas Lewis, shoemaker." It would seem, however from the uncertainty as to the amount, that the consideration would be about as open to inference as it was in Newbery *v.* Armstrong, 1 Moo. & M. 389, from the reference simply to the "late employment" of the third party.

[1] 2 P. & D. 447.

[2] 7 East, 558, 569.

sale, but not to the conditions of sale, which were not annexed to the catalogue, it was held that the memorandum was insufficient under the seventeenth section. Lord Ellenborough, in delivering the judgment of the court, said: "Supposing the auctioneer or broker for sale to be the agent of both parties, the question then is, Has he made a memorandum of the bargain in this case? and it appears to me that he has not. The minute made on the catalogue of sale, which is not annexed to the conditions of sale, nor has any internal reference thereto by context or the like, is a mere memorandum of the name of a person, whom perhaps we may intend to be the purchaser, *and of the quantity and price of the goods*, which we may perhaps on the foot of such memorandum also intend to have been sold to the person so named in the catalogue. But, in treating it as such memorandum throughout, we must intend also (contrary to the fact) that the goods were sold for ready money, and unattended by the circumstances specified in the conditions of sale. And the conditions of sale, though as unsigned they cannot be evidence of the bargain itself, are yet capable of being given in evidence; and accordingly have been so, as a part of the transaction between the parties, and in order to show that it was on those conditions that the goods were sold. I am of opinion, therefore, that the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a *bargain* under those conditions of sale."

Still more clearly does Kenworthy *v.* Schofield[1] show that to satisfy the requirements of the seventeenth section the whole terms and conditions of sale, all of which go to make the reciprocal considerations between seller and purchaser, must appear in the note or memorandum of the bargain, contract, or agreement, signed by the party to be charged thereby. The facts here were that, at a sale of goods by auction, certain conditions of the sale were read before the biddings commenced, but were not attached to the catalogue. An agent for the defendant was the highest bidder for a lot, and the auctioneer put down the price, £105, and the agent's name, opposite that lot in his catalogue. It was held that the conditions of sale not being annexed to the catalogue, no sufficient memorandum of the bargain was signed to satisfy the seventeenth section. Bayley's, J., judgment is peculiarly in point as to the equal necessity of the whole bargain, under the seventeenth section, appearing in the signed note, including, of course, all that goes to make up a bargain, — the mutual considerations, — as of the whole agreement under the fourth section. He says:

[1] 2 B. & C. 945, 947.

"It has been decided by many cases that in sales of land by auction the auctioneer is agent for both the vendor and vendee, and that such auctions are within the Statute of Frauds. Walker *v.* Constable,[1] Emmerson *v.* Heelis,[2] White *v.* Procter,[3] Kemeys *v.* Proctor.[4] Now, the language of the seventeenth section of the Statute of Frauds relating to sales of goods is in substance the same as that of the fourth section relating to sales of land, the difference being that the latter speaks of an *agreement*, the former of a *bargain*. The word 'bargain' means the terms upon which parties contract; and it appears by Saunderson *v.* Jackson[5] that in order to satisfy the statute the signature must either be to some written document containing in itself *the terms of the bargain*, or connected with some other document which does. Then comes Hinde *v.* Whitehouse,[6] in which Lord Ellenborough, after time taken for consideration, delivered it as his opinion that an auctioneer had not satisfied the requisitions of the statute by signing the name of the purchaser to the catalogue, that not being connected with or referring to the conditions of sale. In the present case nothing was said at the time when the lot was put up as to the terms upon which the sale was to proceed. The very mischief contemplated by the statute might occur in such a case as this. There is abundant room for fraud and perjury respecting the conditions of sale. Inasmuch, therefore, as there was not any memorandum of the terms of the bargain, signed by the parties [that is, by the parties to be charged], I think that the case is within the 29 Car. 2, c. 3, § 17, and that a nonsuit must be entered." And Holroyd, J.: "I think that there has not been a signature to a memorandum of the bargain sufficient to satisfy the seventeenth section of the act. It appears to me that you cannot call that a memorandum of a bargain *which does not contain the terms of it*."[7]

[1] 1 B. & P. 306.
[2] 2 Taunt. 38.
[3] 4 Taunt. 209.
[4] 3 Ves. & B. 57.
[5] 2 B. & P. 238.
[6] 7 East, 558.
[7] Where the purchasers of flour wrote a note to the sellers specifying the quantity, quality, and price of the flour, and the sellers answered the note, disputing none of the terms of it, nor mentioning any other terms, but asserting a part performance, it was held that these papers, taken together, contained a sufficient note or memorandum of the contract, signed by the parties to be charged (the sellers), to satisfy the 17th section of the statute. Jackson *v.* Lowe, 1 Bing. 9. So, in Saunderson *v.* Jackson, 2 B. & P. 238, it was held by the court, Lord Eldon delivering the judgment, that a letter signed by the defendants could be connected with a bill of parcels delivered by them to the plaintiffs showing all the terms of the contract, and that this satisfied the 17th section of the statute. The cases are very numerous where it has been held, either directly or incidentally, that the note or memorandum in writing, to satisfy the 17th section of the statute, must show all the terms of the bargain, contract, or agreement, and hence must show all that goes to make up the mutual consideration of the parties to the contract. In Schneider *v.* Norris, 2 M. & S. 286, 289, Bayley, J., said: "The object of the statute was to protect parties from being bound by contracts, unless it could be

The conclusions of law which we deduce on the questions we have been here investigating are: —

seen that the terms on which they contracted were under their signature." And see Champion *v.* Plummer, 1 B. & P. N. R. 252; Hodgson *v.* Le Bret, 1 Camp. 233; Phillimore *v.* Barry, 1 Camp. 513; Cooper *v.* Smith, 15 East, 103; Kent *v.* Huskinson, 3 B. & P. 233; Allen *v.* Bennet, 3 Taunt. 169; Littler *v.* Holland, 3 T. R. 590; Harvey *v.* Grabham, 5 A. & E. 61; Stowell *v.* Robinson, 3 Bing. N. C. 928; Greaves *v.* Ashlin, 3 Camp. 426; Meres *v.* Ansell, 3 Wils. 275; Elmore *v.* Kingscote, 5 B. & C. 583; Haughton *v.* Morton, 5 Ir. C. L. 329; Richards *v.* Porter, 6 B. & C. 437; Smith *v.* Surman, 9 B. & C. 561; Cooper *v.* Smith, 15 East, 103; Archer *v.* Baynes, 5 Ex. 625.

But where the terms of the bargain are stated in a note or memorandum in writing, signed by the party to be charged, even though the contract be repudiated in the same writing, the statutory requirements are satisfied. In Blackburn on Sales (2d ed. p. 62), a doubt is expressed whether such a note or memorandum would be sufficient; but it has been long since expressly decided that it is so. Notwithstanding the high authority of the learned author, we see no reason to question the correctness of the decision. The question arose in Bailey *v.* Sweeting, 9 C. B. N. S. 843, where the defendant in a letter to the plaintiffs stated the terms of the contract, but declined, under the circumstances, to be bound by it. The court held that the statutory evidence was furnished by the letter. Williams, J., well disposes of the question thus: "It cannot for a moment be controverted here, that in point of fact there was a good and lawful contract between the plaintiffs and the defendant for the sale of the goods in question. But it is equally clear that, as the price of the goods bargained for exceeded the value of £10, the contract was not an actionable one unless the requisites of the 17th section of the statute of frauds were complied with. The effect of that enactment is, that although there is a contract which is a good and valid contract, no action can be maintained upon it if made by word of mouth only, unless something else has happened, *e. g.*, unless there be a note or memorandum in writing of the bargain, signed by the party to be charged. As soon as such a memorandum comes into existence, the contract becomes an actionable contract. The question, therefore, in the present case is whether such a memorandum has come into existence. It is plain to my mind that the terms of the defendant's letter do constitute such a memorandum as the statute contemplated. It completely recites *all the essential terms of the bargain*; and the only question is whether it is the less a note or memorandum of the bargain because it is accompanied by a statement that the defendant does not consider himself liable in law for the performance of it. There is nothing in the statute to warrant that. I think the statute is satisfied, and that the contract is an actionable one. It is said that there may be a difficulty in maintaining this doctrine, in consequence of the inconvenience which may arise from the property not passing by the contract until it has become capable of being enforced by action. That may be true; but the same may be said as to part acceptance or the payment of earnest; and yet nobody ever suggested a doubt that an action might be brought upon a verbal contract where either of these things has taken place. I entirely agree with my lord in his appreciation of my brother Blackburn's book; but after fully considering the proposition which has been cited from it, and the reasoning upon which that proposition is based, I feel bound to say that I do not consider it satisfactory. The right of the defendant to put an end to the contract, if any such right existed, ought not to affect the question whether there was a valid contract or not. There was a valid contract, and the memorandum was a sufficient memorandum. The intention of the defendant to repudiate or abandon the contract cannot affect the question as to the sufficiency or insufficiency of it." But in Rondeau *v.* Wyatt, 2 H. Bl. 63, it was held, that where the defendant, in his answer to a bill in equity, admits the parol agreement, but relies on the statute, there the requisites of the statute are not met. To have held otherwise, or to hold that where, in giving evidence, the party whom it is sought to charge has signed the transcript of his testimony, and thereby has admitted the contract so as to satisfy the statute, would be to encourage perjury instead of preventing it. See Whaley *v.* Bagnal, 1 Br. P. Cas. 345.

And where an invoice of goods has been received by the vendee, to which he refers by letter, and neither in the letter nor invoice are all the material terms of the oral contract stated, there is not here a note or memorandum of the bargain to satisfy the 17th section of the statute. Thus, in McLean *v.* Nicoll, 7 H. & N. 1024, a verbal purchase was made of "plate glass of the best quality;" but

1. The terms "agreement," "contract," "bargain" of the fourth and seventeenth sections of the statute are in effect synonymous; and a note or memorandum in writing of such agreement, contract, or bargain, under either of these sections, is not sufficient unless expressly or by fair inference all the terms of the verbal contract between the parties to it appear in such writing.

2. The consideration of the agreement, contract, or bargain being that which is given or to be given, or done or to be done, by one of the parties to the contract, for that which is given or to be given, or done or to be done, by the other party to the contract; the consideration is, therefore, of the very essence of the contract, and must be expressly stated, or by fair inference appear in the written note or memorandum, whether under the fourth or seventeenth section of the statute; otherwise there is no note or memorandum of the contract such as is required by these sections; the essential thing necessary to constitute an agreement, bargain, or contract at all under these sections not appearing in the writing, as it must do in order to show what such agreement, bargain, or contract is.

3. As the note or memorandum in writing of the agreement, bargain, or contract is required by the statute to be signed only by the party or parties to be charged by it; such note or memorandum in writing is sufficient if signed by the party or parties whom it is sought to charge under such contract, bargain, or agreement, if the parties thereto and all the terms of the contract appear in or by such note or memorandum in writing, even though it be not also signed by the other party or parties to such contract; the assent of such other party or parties thereto, or the

there was no reference to this either in the invoice or in the vendee's letter acknowledging receipt of the invoice. It was held that the requisites of the statute were not met. Pollock, C. B., said: "We all think that the memorandum must contain *all the terms of the contract*. Now, the invoice, taken with the answer, does not contain all the terms of the contract. No doubt cases have decided that an invoice, responded to by a signed letter, may form a memorandum to satisfy the statute of frauds. But in those cases it was held that the memorandum must contain all the terms of the contract; and the invoice, taken with the answer, does not contain all the terms of the contract, according to the evidence of the plaintiff. One term of the contract, relating to the quality of the glass, is not mentioned in the invoice at all; and as the memorandum should contain all the terms of the contract, we cannot hold that the statute of frauds has been complied with. We are first to inquire what was the real contract, and then whether the invoice and answer together furnish a memorandum of what was the real contract. We cannot hold that it does, for the reasons I have stated. It is to be regretted that we should be under the necessity of entering upon such frequent instances of non-compliance with the statute. The cases have gone very far in putting the correspondence of parties together and constituting a memorandum to satisfy the statute. But I think we should not be always searching for something equivalent to a memorandum; and in this case certainly we could not, on any principle, hold that any had been shown." But the principle decided by Bailey *v.* Sweeting, 9 C. B. N. S. 345, stated *ante*, was approved, and that case was affirmed. See Simmons *v.* The Southeastern Ry. Co., 7 Jur. N. S. 851.

mutuality between the parties with respect to the contract, bargain, or agreement, being open to be shown *dehors* the note or memorandum in writing.

4. Obviously, then, the mutuality in a contract is essentially a different thing from the consideration of a contract; the former, as we have seen, being capable of being shown by extrinsic evidence, while the latter must appear in or by the writing.

All these propositions are thoroughly well settled by the English cases which we have examined, and rest, we think, on an entirely sound, logical basis. But many of the decisions in this country are not at all in accord with the above stated propositions; but, as we have intimated, *ante*, in a number of the States it has been professed to be held that the consideration need not be stated in the note or memorandum in writing of the contract, bargain, or agreement, which, by the statute, is required to be signed by the party to be charged by such contract, bargain, or agreement. We say advisedly "professed to be held," because we think, that, even in the States where the courts have most strongly professed to hold that the consideration need not appear in the written note or memorandum, in order to satisfy the statute, they are most inconsistent and contradictory in their holdings on the subject. We think, further, that if, in any of the States, it were really and persistently held that the consideration need not appear in and by the writing, they would thereby virtually repeal the statute. And in those States where they have enacted a statute of frauds, and then have gone on to provide that the consideration need not appear in the writing; it seems to us, that they simply enact that, on the one hand, certain contracts must be evidenced by a note or memorandum in writing; and then, on the other hand, further enact that such contracts need not be evidenced in writing, inasmuch as the very ingredients without which they are not contracts at all need not be shown by the writing.

We shall direct attention to some of such statutes by and by. We shall now point out what we think are the contradictions and absurdities in the cases of some of those States which profess to hold, that, under the statute, the consideration need not be stated in the writing. The leading case for the doctrine that the consideration need not appear in or by the note or memorandum in writing is Packard *v.* Richardson;[1] the head-note of which is: "A promise to pay the debt of another in writing, and signed by the party intending to be bound, is a sufficient compliance with the Statute of Frauds, without any recital in the writing, of the consideration upon which the promise is founded."

[1] 17 Mass. 122.

In this case, the first mistake apparent is, that the Massachusetts statute, which, in effect, like that of 29 Car. 2, c. 3, enacts that "No action shall be brought, whereby to charge the defendant upon any special promise [which, as we have seen, *supra*, imports a consideration, as do contract, agreement, bargain, sale] to answer for the debt, default, or misdoings of another person, unless *the agreement upon which such action shall be brought*, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," etc., is, it seems to us, deprived of much of its clear legal force. As no action will lie upon an agreement, or special promise, which is without consideration; and as the statute requires that the agreement (*i. e.*, the whole agreement *upon which the action shall be brought*), or some note or memorandum of it (*i. e.*, *of the whole agreement upon which the action shall be brought*) shall be in writing, it seems to us clear that if the writing fail to contain one of the most essential parts of the agreement,—its very foundation, the consideration,—there is no written statement of the agreement *upon which the action is brought*, nor note or memorandum in writing of such agreement.

In Packard *v.* Richardson,[1] it is claimed by Parker, C. J., that the terms in the statute mean nothing more than promise or engagement, and, therefore, all that is required is a statement in writing of the promise or engagement. It might be enough to say that it is not this that the statute requires; but, rather, that the agreement, or a note or memorandum of it, and not of the mere promise or undertaking, is what the statute requires should be in writing. But, as has been pointed out, *supra*, in reference to the English statute, so, in the Massachusetts statute, in the same section in which it is there enacted as above, a similar enactment is made in reference to a contract for the sale of lands. How then, as has been well asked by one of the English judges,[2] would a memorandum of a contract for the sale of lands appear, in which there was no note of the consideration? As the consideration here is simply what the one party to the contract is to get for what the other party is to give, the note or memorandum of "the contract" which contained no reference to the consideration, would be no note or memorandum of a contract at all. It would be, on the one hand, merely, "I, A., agree to sell B. my lands," without stating either price or terms; or, on the other hand, "I, B., agree to pay A. $1000, in six months with interest," without stating for what this was to be paid, leaving, in either case, against the letter and spirit of the act, virtually everything that the act requires to be in writing to be proved by parol.

[1] 17 Mass. at p. 130.

[2] Bayley, J., in Saunders *v.* Wakefield, 4 B. & Ald. 595, 601. See *ante*, p. 522, n.

Were the same principle carried out, — which, as we will show presently, has not been done by either the Massachusetts court or by those courts in the other States in this country which have professed to follow the principle of what we think is the utterly untenable, illogical case of Packard *v.* Richardson,[1] — with cases coming under such a section as the seventeenth of 29 Car. 2, c. 3, and that section would be absolutely repealed; notwithstanding the erroneous statement, to which we have previously referred, in Smith's Leading Cases in England, and in Parsons on Contracts and in the American Notes to Benjamin on Sales in this country, that, under the English decisions, the consideration for "the agreement" had to be stated in the writing under the fourth section, but that the consideration for "the bargain" had not to be stated in the writing under the seventeenth section.

Parker, C. J., in Packard *v.* Richardson,[2] quite correctly suggests, as we have shown[3] is the case unquestionably, that there is no material distinction to be taken between the term "agreement" of the fourth section and "bargain" of the seventeenth.[4] But while thus far right, all his reasoning in connection therewith is manifestly unsound. His idea seems to be very much as Lord Ellenborough's first and erroneous impression in Egerton *v.* Matnews[5] seems to have been: that, to satisfy the fourth section of the statute, according to the holding in Wain *v.* Warlters,[6] not only the consideration for the contract must appear by the writing, but that the *aggregatio mentium* — the mutuality of the parties to the contract — must also appear by the writing.[7] This,

[1] 17 Mass. 122.

[2] *Ibid.* at p. 131.

[3] *Ante*, p. 505 *et seq.*

[4] See also, to the same effect, Hunt *v.* Adams, 5 Mass. 358, 360, *per* Parsons, C. J.

[5] 6 East, 307.

[6] 5 East, 10.

[7] In Packard *v.* Richardson, 17 Mass. 122, the action was by the indorsee of a promissory note, on an indorsement on the note by the defendants, as follows: "We acknowledge ourselves to be holden as surety for the payment of the within note." Had this indorsement been made concurrently with the making of the note, it is clear that no other consideration than that which was involved in the note itself would have been necessary. In another case decided in the Massachusetts court, Hunt *v.* Adams, 5 Mass. 358, it was held, Parsons, C. J., delivering the judgment, that such an undertaking was not a collateral undertaking to pay the debt of another, but was an original undertaking; the surety, in effect, being a joint and several promisor with the maker; the consideration to bind the surety being apparent on the face of the note, being the credit given to the principal by the promisee for the value received of him. In Bickford *v.* Gibbs, 8 Cush. 154, in an action on a guaranty on a promissory note, it was held that where the guaranty is made after the note has been made, delivered, and received as a complete contract, the guaranty is then a collateral promise to the note, and a distinct consideration for the guaranty must be proved. But when the guaranty is made on the note before its delivery by the maker to the promisee, it must be deemed to be done for the benefit of the maker, to add to the strength of the note and to induce the promisee to take it and advance his money on it; and no other consideration is necessary than the credit thus given to the maker. See Benthal *v.* Judkins, 13 Met. 265; Robinson *v.* Abell, 17 Ohio, 36; Champion *v.* Griffith, 13 Ohio, 228; Colburn *v.* Averill, 30 Me. 310; Gilligham *v.* Boardman, 29 Me. 79; Simons *v.* Steele, 36 N. H. 73; Draper *v.* Snow, 20 N. Y.

next to the error of misconstruing the word "agreement" in the statute, is, we think, the leading error in the decision of Packard *v.* Richardson.[1] Thus Parker, C. J., there says: "In the case of Egerton *v.* Mathews[2] it was decided that a memorandum *containing only one side of the bargain*, and without any consideration expressed, was sufficient. When this case came before Lord Ellenborough, at *nisi prius*, he thought it governed by Wain *v.* Warlters; and it is certainly difficult to perceive a difference between the two

331; Manrow *v.* Durham, 3 Hill, 584; Higgins *v.* Watson, 1 Mich. 428; Campbell *v.* Knapp, 15 Pa. St. 27; Klein *v.* Currier, 14 Ill. 237; Rich *v.* Hathaway, 18 Ill. 548. In one sense, an indorsement of a note or bill, or the acceptance of a bill, is a collateral undertaking to pay the debt of another, but the consideration for the note or bill is sufficient to sustain an action against the indorser or acceptor, notwithstanding the statute of frauds. See Raborg *v.* Peyton, 2 Wheat. 385. In this case, Story, J., said: "An acceptance is not a collateral engagement to pay the debt of another. It is an absolute engagement to pay the money to the holder of the bill; and the engagements of all the other parties are merely collateral. *Primâ facie*, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor; and is, of itself, an express appropriation of those funds for the use of the holder. The case may, indeed, be otherwise; and then the acceptor, in fact, pays the debt of the drawer; but as between himself and the payee, it is not a collateral, but an original and direct undertaking. The payee accepts the acceptor as his debtor, and he cannot resort to the drawer but upon a failure of due payment of the bill. The engagement of the drawer, therefore, may more properly be termed collateral. Yet it has been held, that debt will lie in favor of a payee against the drawer in case of non-payment by the acceptor. Hond's Case, Salk. 23; Hodges *v.* Steward, Skin. 346. And see Bishop *v.* Young, 2 B. & P. 78." So in Fisher *v.* Beckwith, 19 Vt. 31, 34, the court said: "It is objected to the acceptance that it was an undertaking to pay the debt of another, viz., the debt of Woodman to the plaintiff, and, being by parol and not in writing, was void under the statute of frauds; that it was given without consideration; and that it was a conditional or partial acceptance, and, therefore, variant from the declaration. It is not disputed that, at common law, a parol or oral acceptance of a bill may be sufficient and binding. Nor am I aware that, in an ordinary case, it was ever held to be a contract within the statute of frauds. Most, if not all, the reported decisions, adjudging such an acceptance good, have been subsequent to the English statute of Frauds. Erskine *v.* Murray, 2 Str. 817; Lumley *v.* Palmer, 2 Str. 1000; Sproat *v.* Matthews, 1 T. R. 182; and many others. It is the common presumption that a bill of exchange in the usual form is drawn on account of some indebtedness from the drawee to the drawer. Vere *v.* Lewis, 3 T. R. 182; Symons *v.* Parmenter, 1 Wils. 185; s. c. in error, 2 Br. P. C. 43; Chittenden *v.* Hurlburt, 2 Aikens (Vt.), 133. And in the present case, that presumption is confirmed by evidence. It follows that the defendant's acceptance was rather an undertaking to pay his own debt to Woodman, than Woodman's debt to the plaintiff; although such a payment of the former might operate as payment of the latter also." In Packard *v.* Richardson, 17 Mass. 122, the guarantee seems to have been given subsequently to the making of the note. But, independent of this, the case may have been quite well decided, and yet all the extra-judicial reasoning which it contains, and which is so repugnant to the long unbroken decision of the English cases, from Wain *v.* Warlters, 5 East, 10, and Egerton *v.* Matthews, 6 East, 307, down, be, as we think it is, entirely unsound. It is really admitted by Parker, C. J., in Packard *v.* Richardson, 17 Mass. at p. 128, that the undertaking of the defendant was an original and not a collateral one; and hence, on that ground, was not within the statute of frauds at all. It therefore follows that all the reasoning in the case relative to the non-necessity of the note or memorandum in writing, showing, as the statute requires that it should, the bargain or contract, or agreement, is thus confessedly merely *obiter dicta*; and, therefore, is worthy, even in the Massachusetts court itself, only of such weight as that to which the soundness or otherwise of the reasoning entitles it; which, as we have already intimated, we think is very little.

[1] 7 Mass. 122.

[2] 6 East, 307.

cases. . . . If the technical meaning of the word *agreement* made it necessary to insert the consideration in a collateral promise to pay, why not the word *bargain* also, as Lord Ellenborough at first supposed? But the court, Lord Ellenborough consenting, overruled the decision at *nisi prius*, and decided that a contract for the sale of goods was valid, without any consideration expressed in the contract."

This, as we have shown in our previous examination of the English cases, is altogether an inaccurate statement of them. In Wain *v.* Warlters[1] there was no consideration shown, the promise being simply to pay the amount of a bill on Hall. There was here neither consideration nor mutuality shown. This case was under the fourth section of the statute, and the writing was held insufficient to satisfy the statute. In Egerton *v.* Mathews[2] the consideration appeared in the writing, but not the mutuality. Lord Ellenborough seems at first to have been of opinion that both were necessary to be shown by the writing. The consideration for the defendant's promise, as stated in the writing, was "30 bales of Smyrna cotton," *for which* (showing the consideration) the defendant was to give the plaintiff 19*d.* per lb. Here, then, was a clear statement of the entire contract, bargain, or agreement, including a statement of the consideration, the price to be paid being the consideration for the cotton to be received, the cotton to be received the consideration for the price to be paid. Lord Ellenborough here himself showed that mutuality was not necessary to be shown by the writing, and that the bargain, which showed the consideration, was shown in and by the writing. His language is, the italics being his own: "The words of the statute were satisfied if there were 'notes or memorandum in writing of the *bargain*, signed *by the parties to be charged by such contract.*' And this was a memorandum of the bargain, or at least of so much of it as was sufficient to bind *the parties to be charged therewith*, and whose signature to it is all that the statute requires." That is, the whole bargain, including the consideration, is shown; but the statute does not require that the mutuality shall be shown in the writing, which logically and conclusively can only be done by the writing being signed by both parties to the bargain, contract, or agreement; and *that* the statute does not require. Hence it was held in this case, under the seventeenth section, in perfect consistency with Wain *v* Warlters,[3] under the fourth, that the statutory requirements were complied with. Stadt *v.* Lill,[4] following these cases, was decided by Lord Ellenborough, whose decision was

[1] 5 East, 10.
[2] 6 East, 307.
[3] 5 East, 10.
[4] 9 East, 348.

affirmed by the full court, and is in perfect accord with both Wain *v.* Warlters and Egerton *v.* Mathews. Here the case again was under the fourth section, and the writing was, "I guarantee the payment of any goods which J. Stadt delivers to J. Nichols." It was held that this note or memorandum in writing met the requirements of the fourth section of the statute, and showed the "agreement" under which the defendant was to be charged. His promise to pay was *for* the goods to be furnished. The consideration here again was shown, but not the mutuality. But it is the former that the statute requires, and not the latter, as in effect was held in Egerton *v.* Mathews.[1] The still later case of Saunders *v.* Wakefield,[2] which, in its facts, is virtually identical with Wain *v.* Warlters,[3] followed and affirmed the decision in this latter leading case. And in Laythoarp *v.* Bryant,[4] in perfect harmony with all these cases, it was at last definitely and expressly held that though, under the statute, the consideration must appear by the writing, the mutuality need not do so; Tindal, C. J., pointing out the confusion which exists in mistaking the *mutuality* of claims as the *consideration* of the agreement. We think the failure of the court in Packard *v.* Richardson[5] to understand the holding of the English cases which they were examining, leaves the *obiter dicta* in that case unentitled to the slightest weight.[6]

[1] 6 East, 307.
[2] 4 B. & Ald. 595.
[3] 5 East, 10.
[4] 2 Bing. N. C. 735.
[5] 17 Mass. 122.
[6] We notice that the editor of the Massachusetts Reports (ed. of 1864) in his notes, 17–19, to Packard *v.* Richardson, 17 Mass., pp. 130–132, points out the fallacy of the court in their reasoning in that case as regards the possibility of an *agreement* being set out in which no consideration appears; and in their failure to notice the distinction between Wain *v.* Warlters, 5 East, 10, and Egerton *v.* Mathews, 6 East, 307, in both of which cases he correctly says "the same principle was applied." For cases in which the *obiter dicta* in Packard *v.* Richardson, 17 Mass. 122, are adopted, see Sage *v.* Wilcox, 6 Conn. 81; Reed *v.* Evans, 17 Ohio, 128; How *v.* Kemball, 2 McLean, 103; Tufts *v.* Tufts, 3 Woodb. & M. 456; Miller *v.* Irvine, 1 Dev. & B. (N. C.) 103. And see Violett *v.* Patton, 5 Cranch, 142; Levy *v.* Merrill, 4 Greenl. 189; Gillighan *v.* Boardman, 29 Me. 79; Halsa *v.* Halsa, 8 Mo. 303; Bean *v.* Valle, 2 Mo. 126; Smith *v.* Ide, 3 Vt. 290; Patchin *v.* Swift, 21 Vt. 292; Hargroves *v.* Cook, 15 Ga. 321. Some of these cases rest on the incorrect assumption that it was decided in Egerton *v.* Mathews, 6 East, 307, that the consideration need not be stated in the writing. As a rule the cases which hold that it is sufficient if the promise, and not the bargain, contract, or agreement, which the statute requires, should appear by the writing, are those relating to a promise to pay the debt of another. In connection with that clause of the 4th section, showing the promise without showing the consideration, the promise does show something in the nature of a specific undertaking that is at least intelligible. But apply the same principle, for instance, to the clause of the 4th section relating to the sale of lands, or to the 17th section relating to the sale of goods, and if the consideration is not shown then virtually nothing is shown. Hence, the English act (The Mercantile Law Amendment Act, 19 & 20 Vic. c. 97), which enacts that a special promise to answer for the debt, default, or miscarriage of another shall not be invalid "by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document," is reasonable and intelligible. But where a statute enacts that contracts, bargains, or agreements, for the sale of lands or goods, must be in writing;

As we consider the reasoning in Packard *v.* Richardson[1] a complete fallacy, and the cases decided on its authority as being badly decided, holding, as they purport to do, that a statute, which requires written evidence of certain bargains, contracts, or agreements, does not require such evidence, but is satisfied by written evidence of that which shows on its face a mere *nudum pactum*, and neither a bargain, contract, or agreement, we would now direct attention to the fact that Packard *v.* Richardson[2] is not law, and is not considered such even in Massachusetts itself.

Thus, in Attwood *v.* Cobb,[3] it was held by the Supreme Court of Massachusetts, Shaw, C. J., delivering the judgment, under a clause similar to the clause in the fourth section of the English Statute of Frauds, relating to the sale of lands, that the note or memorandum in writing "must express *the substance of the contract*," which, as the case manifestly shows, must include the names of the buyer and seller, a sufficient description of the property sold, *the consideration*, in the price which is to be paid, and, where a part of the agreement is that it is to be executed at some time limited, that time must be stated; but where no time has been limited, "it is to be done within a reasonable time; and, therefore, the want of any stipulation to that effect does not render the instrument void," as, *semble*, it would do, if that, or any other material portion of the substance of the contract — *à fortiori*, its very essence, the consideration, that which is to be done by one for that which is to be done by the other — were wanting in the written note or memorandum of the bargain, contract, or agreement. We consider Attwood *v.* Cobb[4] to be in perfect accord with Wain *v.* Warlters,[5] Egerton *v.* Mathews,[6] Stadt *v.* Lill,[7] and the long unbroken line of English cases, in which the doctrine is established that a statute requiring a note or memorandum in writing of a bargain, contract, or agreement, is not satisfied, unless there be a note or memorandum of what the

and then goes on to enact that the consideration for such contracts, bargains, or agreements, need not appear in or by the writing, in effect repeals the statute; as, without the statement of the consideration, which is really the subject-matter of such contracts, bargains, or agreements, that for which money is to be paid, or for which its reciprocal consideration — land or goods — is to be given, does not appear at all. So that, practically, it is questionable if any court of even a low grade of intelligence, could apply the false doctrine that in a statement in writing of a contract, bargain, or agreement, its very subject-matter, the consideration, need not appear in or by the writing. And where, in this class of cases, they do affect to hold that the consideration need not be stated in or appear by the writing, they seem but to make Lord Ellenborough's early apparent mistake of confounding mutuality with the consideration.

[1] 17 Mass. 122.
[2] *Ibid.*
[3] 33 Mass. (16 Pick.) 227.
[4] *Ibid.*
[5] 5 East, 10.
[6] 6 East, 307.
[7] 9 East, 347.

statute expressly requires, namely, of the bargain, contract, or agreement, and not of a mere naked, unsupported promise.[1]

[1] Attwood *v.* Cobb, 33 Mass. (16 Pick.) 227, was an action of assumpsit to recover damages for the non-performance of an agreement to convey certain real estate to the plaintiff. The signed note or memorandum in writing of the defendant was as follows: "This certifies that I have sold to Nathaniel Attwood about five acres of land, more or less, with the shop and other erections and improvements on it, which I own in M. on the road to W., being the same which I bought of him, in consideration of the same sum which I paid him for the same, and interest from the time I purchased the same till I paid for it (supposed about six months), with the expense of the deed, also the taxes for one year." In this case it was not even claimed that the consideration need not be expressed in the writing; but, on the contrary, it was claimed that the consideration to be paid for the land was set forth in the writing with sufficient certainty. And for this proposition, Brown *v.* Bellows, 4 Pick. 179; Packard *v.* Richardson, 17 Mass. 122; Johnson *v.* Ronald, 4 Munf. 77; Penniman *v.* Hartshorn, 13 Mass. 87; Bateman *v.* Phillips, 15 East, 272, and Egerton *v.* Mathews, 6 East, 307, were cited. The contention on the other hand, *inter alia*, was that the writing did not express the consideration, for the amount paid by the defendant, the expense of the deed, and the amount of a year's taxes, could not be ascertained except by parol evidence. For this contention, Bird *v.* Richardson, 8 Pick. 252; Parkhurst *v.* Van Courtland, 1 Johns. Ch. 273; Brodie *v.* St. Paul, 1 Ves. Jr. 326; Blagden *v.* Bradbear, 12 Ves. 466, and Clinan *v.* Cooke, 1 Sch. & Lef. 22, were cited. The court held, not, as was intimated by the so-called leading case of Packard *v.* Richardson, 17 Mass. 122, that it was not necessary that the consideration should appear in or by the writing, but that, as has been established by Wain *v.* Warlters, 5 East, 10; Egerton *v.* Mathews, 6 East, 307, and Stadt *v.* Lill, 9 East, 347, while, under either the 4th or 17th section of the statute, the consideration must be expressed in the writing, yet, as in the latter two of these cases, that the consideration was sufficiently expressed. In so deciding, Shaw, C. J., said: "The other point is attended with more difficulty, which is, that this contract is not conformable to the statute of frauds in relation to contracts for the sale of lands. St. 1783, c. 37, § 2. It provides that no action shall be maintained upon any contract or sale of lands, unless the agreement or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized. It is quite impossible to go through the cases upon this branch of the statute of frauds. *It is sufficient to say, in general terms, that, under this provision, the contract or memorandum must express the substance of the contract, with reasonable certainty, either by its own terms or by reference to some other deed, record, or other matter from which it can be ascertained with like reasonable certainty.*" This is exactly the doctrine of the English cases; the correctness of which even the Massachusetts court, in Attwood *v.* Cobb, 16 Pick. 227, fully and unqualifiedly affirm. Shaw, C. J., continues: "The statute is intended as a shield. No particular forms are required, and it looks at *the substance of the contract. It requires a note or memorandum of the contract* ["*of the contract*," mark! not of the mere unsupported promise which does not show a contract], not a detail of all its particulars. The court are of opinion that the memorandum, loose and unskilful as it is, answers these conditions." How? By not showing the consideration? No! "It refers definitely to facts, familiarly known to the parties, and in all probability, well understood by them; the estate is well described as the same estate which Attwood had before sold to Cobb. The principal uncertainty is as to the price to be paid, for, having considered this as an executory contract, as an agreement for a sale, to be made afterwards, it follows as a necessary consequence, *that when it further states the consideration*, the payment of that consideration is to be further understood, and it has the same meaning as if the words were *in consideration of the same sum to be thereupon paid to me therefor, which I paid him.* This fixes the sum, together with some slight addition of interest to be computed for a time specified, and the expense of a deed. The latter is a trifle, may be considered as very nearly settled by usage, and, at all events, cannot be deemed to be *of the substance of the contract.* As the amount paid for an estate is usually determined *by the consideration expressed in the deed of conveyance*, or by some receipt or memorandum, it is impossible to pronounce *this contract* void under the statute, because it does not express with sufficient certainty the price [*i. e.*, the consideration] to be paid for the estate. As to the uncertainty of the time at which the agreement is to be executed, the case is clear that where on an executory

So, in a somewhat earlier Massachusetts case,[1] but which, also, is later than Packard *v.* Richardson,[2] the same doctrine, substantially, is laid down as is so well decided in Attwood *v.* Cobb;[3] viz., that while the note or memorandum in writing must express the substance of *the whole contract*, including, of course, the consideration, this is sufficient, if done with reasonable certainty.

In Bird *v.* Richardson,[1] the note in writing of *the contract*, signed by the defendant, was as follows (not punctuated): "It is agreed and understood that Wm. S. Bird is to have the refusal of a certain farm situated in A. formerly called the W. farm which farm was bought by me for the sum of 1940 dollars upon his complying with certain conditions from the first day of April next which conditions the aforesaid Wm. S. Bird has complied with." It was not disputed in this case that it was not necessary to state the consideration in order to show the contract; but it was contended that the consideration did not sufficiently appear; and on that ground the plaintiff was nonsuited. But the full court reversed the decision, and held that the written contract set forth was valid, and that it expressed the price to be paid (the consideration) for the land to be conveyed. Reading the passage in the writing, "which farm was bought by me," properly punctuated, as a parenthetical passage, and the consideration is evident.

So, still again, under the clause in the Massachusetts statute, similar to the 17th section of 29 Car. 2, c. 3, the same doctrine is established. In Fessenden *v.* Mussey[3] a pew was sold by auction, on account of the plaintiff, to the defendant. The auctioneer, in his record of sales, made the following entry: "Sale of pew in Bulfinch Street Church, for acc. Selinda Fessenden, Monday, March 24, 1845, Pew No. 18. Benj. Mussey, $112.50. Charges, advertising, and commission, $5." The Statute of Frauds being relied on, the presiding judge held that the memorandum was insufficient to take the case out of the statute. But the full court held, revers-

contract, a party stipulates to do some act, and no time is limited, it is to be done within a reasonable time, and, therefore, the want of any stipulation to that effect, does not render the instrument void." After such a decision, notwithstanding what we think is the utterly unsound reasoning of the Massachusetts court, in the mere *obiter dicta* in Packard *v.* Richardson, 17 Mass. 122, it does, we think, appear remarkable that this latter-named decision of the Massachusetts court should be constantly cited as the leading authority for the proposition that under a statute requiring a note or memorandum in writing of certain contracts, bargains, or agreements, such statute is satisfied by a note or memorandum in writing, which is not a note or memorandum at all of such contract, bargain, or agreement. But see 3 Pars. on Con., 15 n. z.; Br. on Stat. of Frauds, § 391; Wood on Frauds, 61; Benj. on Sales, 4th Am. ed., 243, n., all citing Packard *v.* Richardson, 17 Mass. 122, without any exposure of its incorrectness, and without showing that it is unsupported by even the Massachusetts court itself.

[1] Bird *v.* Richardson, 8 Pick. (25 Mass.) 252.

[2] 17 Mass. 122.

[3] 16 Pick. 227.

[4] 11 Cush. (65 Mass.) 127.

ing such decision, that the memorandum having been made at the time and place of the sale, by the auctioneer, or his clerk, then acting under his directions, designating clearly *what was sold, by whom, to whom, the time when, and the price*, that is, the entire contract, the requirements of the statute were complied with. This case, too, is in the strictest accord with the unbroken doctrine of the English cases, from Wain *v.* Warlters [1] down.

The only apparent explanation for the utter unsoundness of courts, as here, which affect to hold that the consideration, *i.e.* — that, in the contract, which is done or to be done by one *for that* which is done or to be done by the other; showing the contract, bargain, or agreement in its entirety, including the reciprocal considerations of vendor and vendee, promisor and promisee — need not be stated in writing; and yet, that the "writing must express the substance of the contract [*i.e.*, of the whole contract, including the consideration] with reasonable certainty, either by its own terms, or by reference to some deed, record, or other matter from which it can be ascertained with like reasonable certainty," [2] is that they use the term "consideration" in some misty sense, as something that shows "the motive or inducement for making the agreement," [3] rather than as that which is done or to be done by one of the parties to the contract, for that which is done or to be done by the other.[4]

[1] 5 East, 10.

[2] *Per* Shaw, C. J., delivering the unanimous judgment of the Supreme Court of Massachusetts in Attwood *v.* Cobb, 16 Pick. (33 Mass.) at p. 230.

[3] Br. on St. of Frauds, § 381 *a*; where, as we have shown, *supra*, he mistakes the meaning of Bayley, J., in Saunders *v.* Wakefield, 4 B. & Ald. 601; who, to show that, in the case of lands under the fourth section, the consideration must be stated, shows the absurdity of a note in writing which purports to be a note of a contract for the sale of lands which fails to specify the terms or the price; *i. e.*, the consideration. Browne's mistake would seem to have some slight warrant for it, in a similar error made by the Massachusetts court, Parker, C. J., delivering the judgment, in that case so fruitful in fallacies, Packard *v.* Richardson, 17 Mass. at p. 149. There it is said: "Although some consideration must exist to give validity to such a promise [*i. e.*, to answer for the debt, default, or miscarriage of another], it is generally of a nature not to be disputed; and if disputed, has been disputed by *parol* [not *parole*] testimony. The consideration need not be for the benefit of the party making the promise, and it seldom is for his benefit [where it is, it is an original contract between the parties, and is not within the Statute of Frauds at all]; forbearance to sue or the surceasing of a suit being most frequently the consideration of such undertakings, and these being altogether for the benefit of the original debtor. This being the case, it would seldom, if ever, enter into the imaginations of the parties to such a contract that unless *the motives and considerations* which led to it were were put down in writing, the engagement was void." Here the "motives and considerations" of the Massachusetts court would seem to be very much of the uncertain character (as being something different from the technical consideration of the contract), as "the motives and inducements for making the agreement" referred to in Br. on the St. of Frauds.

[4] It has been long since provided by statute in Massachusetts (see Mass. R. S. ch. 74, § 2, p. 472; Mass. Genl. Sts. ch. 105, § 2, p. 527) that the consideration for such contracts, promises, or agreements as are included in the fourth section of the English statute need not be set forth or expressed in the writing signed by the party to be charged, but may be proved by any other legal evidence. This section is not applied to such contracts, bar-

Thus, in Penniman *v.* Hartshorn,[1] where there was a sale of cotton of more than £10 in value, the memorandum relied on to take the case out of the statute was as follows, — "Hartshorn and Arnold of Providence, — I sold to the above gentlemen 39 bales upland cotton, at 40 cents, — 60 days for approved security. Silas Penniman." The principal objection to the sufficiency of this writing was, that it did not specify the weight of the bales of the cotton. But the court, following Egerton *v.* Mathews,[2] held that the memorandum was sufficient; Parker, C. J., in delivering the

gains, or agreements as are included in the seventeenth section of the English act, which are left, in effect, as in the English act. We have already (*ante*, p. 537, n. 6) directed attention to the fact that in England the Mercantile Law Amendment Act merely makes provision that the consideration for a special promise to answer for the debt, default, or miscarriage of another need not appear in the writing, leaving the rest of the fourth section and the whole of the seventeenth unaffected by the amendment. This is very different from providing that the consideration for the sale of lands or goods need not appear in writing. In the case of a promise to pay the debt of another, from the very nature of the subject-matter, the nature of the undertaking itself pretty well appears by the promise. But holding or enacting that a statement in writing relating to a contract, bargain, or agreement for the sale of lands or goods is sufficient which does not show both sides of the contract, that is, what is to be done or given by one as the consideration for what is to be done or given by the other, is a virtual repeal of the statute altogether. Thus, as Bayley, J., put it in Saunders *v.* Wakefield, 4 B. & Ald. 601, with reference to contracts for the sale of land, which is equally correct as to a contract for the sale of goods: "It is clear that the consideration must be stated; for it would be a very insufficient agreement to say, 'I agree to sell A. B. my lands,' without specifying the terms or the price." And evidently it would be a still more "insufficient agreement" in a contract for the sale of lands or goods, simply to express the other side of the bargain, "I agree to pay C. D. $1,000 in six months," without specifying the consideration for which the payment is made. As, therefore, this would be suppressing the entire subject of the contract, bargain, or agreement, it is not surprising to find, on the one hand, that not much force is given to the contradiction involved in a statute which requires that a contract for the sale of lands must be evidenced in writing, and then, in effect, that it need not be so evidenced; or, on the other hand, the cases which affect to hold that the contract for the sale of goods need not be evidenced in writing when the statute says it must be so evidenced. Hence, in Massachusetts, notwithstanding their amended statute and what they affect to hold in Packard *v.* Richardson, 17 Mass. 122, it is not very remarkable to find that the amendment of the statute and the assumed holding of their Supreme Court are both, in effect, ignored.

Thus, in Morton *v.* Dean, 13 Metc. (54 Mass.) 385, which was a sale of lands, the memorandum in writing described the premises, named the vendors and vendee, and the price as well. But as the terms and conditions, which were a part of the contract, and went to its very essence, the consideration, were not in writing, it was held that the statute was not satisfied. The court said: "Where the connection between the memorandum and the conditions is to be proved entirely by parol evidence, it is within the mischief intended to be prevented by the statute. *The terms of the agreement which are material* [including, of course, in the terms the consideration] *must be stated in the writing.* As the memorandum in this case does not refer to the conditions of sale, the sale itself cannot be enforced. The authorities are conclusive on these points." The authorities which were relied on were mainly English, which were not decided under a statute providing that the consideration for such contract or agreement need not appear by the writing. See Hinde *v.* Whitehouse, 7 East, 558; Kenworthy *v.* Schofield, 2 B. & C. 945; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Blagden *v.* Bradbear, 12 Ves. 471; Boydell *v.* Drummond, 11 East, 142; Powell *v.* Edmunds, 12 East, 6; Jacob *v.* Kirk, 2 M. & Rob. 221; Attwood *v.* Cobb, 16 Pick. 230; Grant *v.* Naylor, 4 Cranch, 224; Trustees of Ithaca Baptist Church *v.* Bigelow, 16 Wend. 28; Freeport *v.* Bartol, 3 Greenlf. 340.

[1] 13 Mass. 87.

[2] 6 East, 307.

judgment of the court, saying: "We think it sufficiently particular; the object of the statute being, that *the bargain should be proved by writing, and not by parol;* in order that purchasers shall not be caught up on loose conversation, or that *the proof of the contract* shall not rest upon the recollection or integrity of witnesses. Bales of cotton are nearly of the same size and weight; and, where the weight is left undetermined by the contract, it must be presumed that the ordinary average weight was intended. The case of Egerton *v.* Mathews,[1] which was cited by the counsel for the plaintiff, is exactly parallel with this; and the distinction there taken, between a memorandum necessary to enforce a bargain for the sale of goods, and an agreement which is required to oblige one to pay the debt of another, will hold good here."

As is clearly shown by Egerton *v.* Mathews,[2] compared with Stadt *v.* Lill[3] and the other English cases which follow these, there is no distinction whatever, under the statute, as to the necessity of the whole contract, including, of course, the consideration, being made to appear by the writing, whether the case comes under the fourth or the seventeenth section of the statute; it is evident that the Massachusetts court here were laboring under an error of some kind. The consideration for the cotton sold, "40 cts. *per* lb., at sixty days for approved security;" and the consideration for the price, the "39 bales upland cotton," both clearly appeared in the writing, which, as in both Egerton *v.* Mathews,[4] under the seventeenth section, and Stadt *v.* Lill,[5] under the fourth section, showed the entire contract. It may have been that the court, which thought, in Packard *v.* Richardson,[6] — Parker, C. J., also delivering the judgment there, — that Wain *v.* Warlters[7] held, that unless "the motives and considerations [whatever they mean by this] which led to the contract were put down in writing, the engagement was void," thought there was something else connected with the making of a contract which they call "the motives and considerations," and Browne on the Statute of Frauds calls the "motives and inducements;" but it is perfectly clear that, in Penniman *v.* Hartshorn,[8] as in Egerton *v.* Mathews,[9] and Stadt *v.* Lill,[10] the reciprocal considerations which went to make up the respective contracts were stated in the writing; slightly less clearly, in fact, in Stadt *v.* Lill, under the fourth section, than in Egerton *v.* Mathews, or Penniman *v.* Hartshorn, under the seventeenth.[11]

[1] 6 East, 307.
[2] *Ibid.*
[3] 9 East, 348.
[4] 6 East, 307.
[5] 9 East, 348.
[6] 17 Mass. at p. 129.
[7] 5 East, 10.
[8] 13 Mass. 87.
[9] 6 East, 307.
[10] 9 East, 348.
[11] As the memorandum in writing of the contract in Penniman *v.* Hartshorn, 13

There are numerous other cases in the Massachusetts Supreme Court itself, in addition to those we have already examined, the holding and reasoning in which show the utter unsoundness of what that court affected to hold in Packard *v.* Richardson,[1] viz., that a note or memorandum in writing, under the statute, of the contract, need not be a note or memorandum of the contract, but only of a part of the contract; one side of the contract being open to be proved by parol. Thus, in Gill *v.* Bicknell,[2] the absurdity of what we think is an utterly ridiculous proposition is virtually conceded. There the question came up as to the sufficiency of the note or memorandum in writing of a contract for sale of land, by auction, where *all the terms* of a contract appeared in the writing, and the court again held, as they had previously held in Morton *v.* Dean,[3] that the writing must "*constitute a contract* [that is, an entire contract; not the one side of a contract, as, in Packard *v.* Richardson,[4] the court affected to hold was all that was necessary; dissenting from the well-decided case of Wain *v.* Warlters,[5] which expressly held the contrary], or the memorandum of a contract, *from which its substance and terms may be gathered*."[6]

Mass. 87, was only signed by the vendor, and not by the vendees, — the latter of whom were the parties sought to be charged, — the position was taken that the writing was insufficient under the statute, as it did not show mutuality. And it is quite possible, and looks probable, that, being misled by Lord Ellenborough's apparent first and wrong impression in Egerton *v.* Mathews (6 East, 310), that mutuality must appear in the written memorandum of an agreement under the fourth section, but not of a bargain under the seventeenth, the Massachusetts courts confounded the mutuality of a contract, which is one thing, with the consideration, which is quite another. It is at least quite obvious that neither in Packard *v.* Richardson, 17 Mass. at p. 129, nor in Penniman *v.* Hartshorn, 13 Mass. 87, had the court at all a correct conception as to the simple question as to what the consideration in a contract is. Certainly in Penniman *v.* Hartshorn, 13 Mass. 87, the consideration appeared in every way quite as clear as it did in Stadt *v.* Lill, 9 East, 348, and in other cases which have followed it, under the fourth section of the English statute.

[1] 17 Mass. 122.
[2] 56 Mass. (2 Cush.) 355, 359.
[3] 13 Met. 385.
[4] 17 Mass. 122.
[5] 5 East, 10.
[6] On the point in question. — another point being also involved in the case which still further exemplifies the necessity (under the holding in the Massachusetts Court, and notwithstanding their statutory provision that the consideration need not appear in the writing) of *the whole contract* appearing in and by the writing, — Shaw, C. J., in delivering the unanimous judgment of the court, says: "Because it is a contract for the sale of lands, no action will lie unless the contract, promise, or agreement, or some memorandum or note thereof, is in writing, signed by the party to be charged therewith, or by some person by him authorized. Rev. Stats. c. 74, § 1, cl. 4." Then, after referring to the reason why the auctioneer is to be deemed the agent of the bidder to sign the memorandum which is to prove "*the making and terms of the contract*," *i. e.*, of the whole contract, the learned chief justice proceeds: "But this presupposes that the name is thus written on a book or memorandum prepared, under a caption stating *the subject-matter and terms of the sale;* or on the catalogue, advertisement, or written or printed *conditions of sale;* or so definitely referring thereto as to make the paper referred to a part of the memorandum. *The bid* is in the nature of an affirmative answer, and it is necessary to consider the proposal in order to understand the effect of the answer. *Both together may constitute a contract, or the memorandum of a contract, from which its sub-*

The later case of Sanborn *v.* Flagler,[1] too, in effect shows, as in the English cases, that, in a contract for the sale of goods within the seventeenth section of the act, the whole contract, or a memorandum of the whole contract, must appear in the writing, although the mutuality may be proved *aliunde*. But the consideration, unquestionably, must appear, or no "complete contract" is shown. Thus, in this case, it was held that the note or memorandum of the contract did set forth, "upon its face, in such manner as to be understood by the court, *the essential elements of a contract*." These were: The contracting parties; "the nature and description of the merchandise, the quantity sold, the price to be paid therefor, the terms of payment, and the time within which the article was to be delivered." In these "essential elements of a contract," the reciprocal considerations, — not, perhaps, the so-called "motives and inducements," or "motives and considerations," — clearly appeared.[2]

stance and terms may be gathered. In a recent case in this court it was held, that the putting down the name of a bidder was not a sufficient memorandum in writing, because it was not under such a caption, and did not so definitely refer to any catalogue, advertisement, written or printed, or conditions of sale, as to make them part of the memorandum. Morton v. Dean, 13 Met. 385. Commonly *the advertisement expresses the property to be sold, and if not the names of the owners, the actual owners, represented by the auctioneer, together with the time and other terms of payment; so that when the name of the bidder and the price are added, the whole constitutes the elements and substance of a complete contract.* But, it may be asked, a contract between whom? Obviously the owner or owners on the one side, and the purchaser or purchasers on the other. *Primâ facie*, therefore, the auctioneer's memorandum, or a memorandum by the bidder, in his own name, *constitutes such a contract.*" All of which, notwithstanding the provision in the Massachusetts statute (Rev. Stats. p. 472, c. 74, § 2) that the consideration "need not be set forth or expressed in the writing," is a very plain implication that the writing must "constitute the elements and substance of a complete contract," including that which is to be given for that which is to be received, and that which is to be received for that which is to be given; or, the consideration.

[1] 91 Mass. (9 Allen) 474.

[2] Sanborn *v.* Flagler, 91 Mass. (9 Allen) 474, was an action against the defendants for refusal to deliver 50 tons of best refined iron. The statute of frauds was relied on by the defendant. There was a note in writing of the contract, as follows: —

"Will deliver S. R. & Co. best refined iron 50 tons within 90 days, at 5 cents *per* lb., 4 of cash. Plates to be 10 to 16 inches wide, and 9 feet to 11 long. This offer good till 2 o'clock, Sept. 11, 1862."

This was signed with the initials of one of the plaintiffs and one of the defendants, each representing his own firm. The offer was verbally accepted before two o'clock on the day named. The court held that the statute was satisfied. The judgment, which was delivered by one of the ablest jurists either of England or of this country, Bigelow, C. J., is in most perfect harmony with the English cases of Wain *v.* Warlters, 5 East, 10; Egerton *v.* Mathews, 6 East, 307; Stadt *v.* Lill, 9 East, 348, and the other English and American cases which accord with the holding in those well-decided cases. The learned chief justice, in disposing of the questions raised in the case, said: "The note or memorandum on which the plaintiffs rely to maintain their action *contains all the requisites essential to constitute a binding contract within the statute of frauds.* It is not denied by the defendant that a verbal acceptance of a written offer to sell merchandise is sufficient to constitute *a complete and obligatory agreement* on which to charge the person by whom it is signed. In such case, if the memorandum is otherwise sufficient when it is assented to by him to whom the proposal has been made, the contract is consummated by the meeting of the minds of the two parties, and the evidence necessary to render it valid and capable of enforcement is supplied by

Again, in Farwell *v.* Mather,[1] which was an action on a contract for the sale of lands, where $16,500 was to be paid, and there was

the signature of the party sought to be charged to the offer to sell. Indeed, the rule being well settled that the signature of the defendant only is necessary to make a binding contract within the provisions of the statute relating to sales of merchandise, it necessarily follows that an offer to sell, and an express agreement to sell, stand on the same footing, inasmuch as the latter, until it is accepted by the other party, is in effect nothing more than a proposition to sell on the terms indicated. The acceptance of the contract by the party seeking to enforce it may always be proved by evidence *aliunde*. The objections on which the defendants rely are twofold. The first is, that the note or memorandum does not set forth upon its face, in such manner as to be understood by the court, *the essential elements of a contract*. But this position is not tenable. *The nature and description of the merchandise, the quantity sold, the price to be paid therefor, the terms of payment, and the time within which the article was to be delivered*, are all clearly set forth. But it is urged that the paper does not disclose which of the parties is the purchaser and which the seller, and that no purchaser is, in fact, named in the paper. This would be a fatal objection if well founded. There can be no contract, or valid memorandum of a contract, which does not show who are the contracting parties. [And equally so, clearly, which, if silent as to the consideration, does not show the *contract* at all.] But there is no such defect in the note or memorandum held by the plaintiffs. The stipulation is explicit to deliver merchandise to S. R. & Co. *It certainly needs no argument to demonstrate that an agreement to deliver goods at a fixed price, and on specified terms of payment, is an agreement to sell.* [And it certainly should need no argument to demonstrate that the converse of this is *not* an agreement to sell.] *Delivery of goods at a stipulated price constitutes a sale;* an agreement for such delivery is a contract of sale. Nor can there be any doubt raised as to the intrinsic import of the memorandum concerning the character or capacity in which the parties are intended to be named. A stipulation to deliver merchandise to a person clearly indicates that he is the purchaser, because in every valid sale of goods delivery must be made by the vendor to the vendee. We can, therefore, see no ambiguity in the insertion of the name of the purchaser or seller. The case is much stronger in favor of the validity of the memorandum in this respect than that of Salmon Falls Manuf. Co. *v.* Goddard, 14 How. 446. There only the names of the parties were inserted, without any word to indicate which was the buyer and which was the seller. It was this uncertainty in the memorandum which formed the main ground of the very able dissenting opinion of Mr. Justice Curtis in that case. So in the leading case of Bailey *v.* Ogdens, 3 Johns. 399, there was nothing in the memorandum to show which of the two parties named agreed to sell the merchandise. But in the case at bar, giving to the paper a reasonable interpretation, as a brief document drawn up in the haste of business, and intended to express in a few words *the terms of a bargain*, we cannot entertain a doubt that it indicates with sufficient clearness *that the plaintiffs were the purchasers and the defendants the sellers of the merchandise, on the terms therein expressed.* Indeed, we can see no reason why a written agreement by one party to deliver goods to another party does not as clearly show that the latter is the purchaser and the former the seller, as if the agreement had been in express terms by one to sell goods to the other.

"The other objection to the memorandum is, that the name of the party sought to be charged does not appear on the face of the paper. If by this is meant that the signatures of all the persons who are named as defendants are not affixed to the memorandum, or that it is not signed with the copartnership name under which it is alleged that the persons named as defendants do business, the fact is certainly so. But it is not essential to the validity of the memorandum that it should be so signed. An agent may write his own name, and thereby bind his principal; and parol evidence is competent to prove that he signed the memorandum in his capacity as agent. On the same principle, a partner may, by his individual signature, bind the firm, if the contract is within the scope of the business of the firm, which may be shown by extrinsic evidence. Soames *v.* Spencer, 1 D. & R. 32; Higgins *v.* Senior, 8 M. & W. 834; Williams *v.* Bacon, 2 Gray, 387, 393. Besides, in the case at bar, the action in effect is against Flagler only. He only has been served with process, and appears to defend the action. Whether he signed as agent for the firm or in his individual

[1] 92 Mass. (10 Allen) 322.

a note or memorandum in writing to that effect, signed by the parties to be charged, and, in fact, by both the parties to the contract; yet, notwithstanding the Massachusetts statute, which provides that the consideration "need not be set forth or expressed in the writing," "but may be proved by any other legal evidence,"[1] it was held that as the consideration for this "promise, contract, or agreement" did not sufficiently appear in the writing, the contract was void under the statute. True, the consideration here was the other subject-matter of the contract; but the consideration is always one part or the other, reciprocally, of the contract; and if, either under the English Statute of Frauds, or under the Massachusetts statute, which provides that in a written memorandum of a contract for the sale of lands, the consideration need not be shown, only one side of the contract need appear in the writing; there would seem to be the same difficulty in making out the contract of the parties, as well by the omission of the subject-matter of the contract on the one side as on the other. While a provision that the consideration for the promise to pay the debt of another need not appear in the writing, may be feasible, leaving still something like an appreciable undertaking to be shown by the writing; with such a provision applied to sales of lands or goods, the statute, requiring written evidence of the contract, bargain, or agreement, is, in effect, repealed.[2]

capacity is immaterial. In either aspect he is liable on the contract. It is hardly necessary to add that the signature is valid and binding though made with the initials of the party only, and that parol evidence is admissible to explain and apply them. Phillimore *v.* Barry, 1 Camp. 513; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. 446; Barry *v.* Coombe, 1 Pet. 640."

[1] Mass. Rev. Stats. p. 472, c. 74, § 2.

[2] For some reason or another the provision in the Massachusetts statute, that the consideration need not be shown by the writing, is applied only to the section analogous to the 4th section of the English statute, leaving the section analogous to the 17th section of the English statute unaffected by such an absurd and destructive provision. It may have been that the Massachusetts legislators, like so many of the text-writers, rested under the delusion that the indispensable ingredient in all executory agreements of a consideration was something different from what it really is; and that, therefore, a contract — an entire contract — could be shown without showing one part of the contract, the consideration for the other part of it; and that, as stated by some of the text-writers, the consideration, under the 17th section of the English act, did not have to appear in and by the writing. However this may be, in some of the States they have gone further, and have actually enacted that the consideration need not appear in the note or memorandum in writing of any contract which, under their statute of frauds, is required to be evidenced by writing. Thus, in Michigan, Comp. Stats. § 6186, while in effect retaining the 17th section of the English statute, requiring a note or memorandum in writing of *the bargain*, to render valid *any contract* for the sale of any goods, wares, or merchandise, for the price of $50 or more, they have actually enacted (*Ibid.* § 6189) that "the consideration of any contract, agreement, or promise required by this chapter to be in writing, need not be expressed in the written contract, agreement, or promise, or in any note or memorandum thereof, but may be proved by any other legal evidence." This provision for omitting the evidence in writing of one half of the contract or bargain, which the previous section required to be wholly evidenced by the writing, is very much like Hamlet with Hamlet left out. But, to make the effect of § 6189 still more uncertain, by § 6187 it is enacted that, "Whenever any goods

shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale book a memorandum specifying *the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made*, such memorandum shall be deemed a memorandum of the contract of sale within the meaning of the last section." After this statutory definition of the "memorandum of the contract of sale," in which every ingredient of the contract of sale is required to be stated in the writing, it is rather puzzling to tell what they fancy "the consideration of a contract or agreement of sale" is, when they enact, as above named, that "the consideration of any contract, agreement, or promise required by this chapter to be in writing, *need not* be expressed in the written contract, agreement, or promise, or in any note or memorandum thereof, but may be proved by any other legal evidence." First strictly defining the written note or memorandum which is to answer the requirements of the section, and then going on to enact that one half of such defined note or memorandum is unnecessary, certainly leaves the matter in the gravest doubt what they mean by "consideration." It seems certain that, though they may perhaps mean mutuality, or what is sometimes called "the motives and inducements," or "the motives and considerations," by "consideration" they clearly cannot mean *the consideration; i. e.*, that which the one party to the contract is to receive for what the other is to pay, or what the one party is to pay for that which he is to receive.

Where the promise is to pay the debt of another, the other part of the contract, namely, the promisee's part, is the consideration, and no case, outside of the question of mutuality, as in Wain *v.* Warlters, 5 East, 10, disputes this. See Jones *v.* Palmer, 1 Doug. (Mich.), 379; Hall *v.* Soule, 11 Mich. 494; Leonard *v.* Vredenburg, 8 Johns. 29; DeWolf *v.* Rabaud, 1 Pet. 476; Nelson *v.* Dubois, 13 Johns. 175; Bailey *v.* Freeman, 4 Johns. 283; 11 Johns. 221; Wheelwright *v.* Moore, 1 Hall (N. Y. Sup. Ct.), 201; 2d ed. 225; Myers *v.* Morse, 15 Johns. 425; Hunt *v.* Adams, 5 Mass. 358. The confusion as to the consideration seems confined to such cases as sales of land under the 4th section of the statute of frauds, or the sale of goods under the 17th section. In these cases it seems very generally to be thought, as we have shown, that the consideration is something called the "motives or inducements," or "the motives or considerations," *dehors* the contract. In Whipple *v.* Parker, 29 Mich., 369, 373, the court said: "The consideration for the agreement, promise, or stipulation of the party to be charged and which is in writing, may, and perhaps generally does consist of counter promises or executory stipulations to be performed by the other party." This is true, with reference, generally, to cases where the consideration is but a promise for a promise; as a promise to pay the debt of another, for or in consideration of the promise of the creditor to forbear to sue, or to give time. Here, to show the contract, the mutual promises must be alleged in the writing signed by the party to be charged. But, in a case, for instance, of a sale of goods for cash, the goods to be received are the consideration for the money to be paid, as in Egerton *v.* Mathews, 6 East, 307; and there, the consideration is sufficiently shown without any allegation in the writing of mutual promises.

It is just possible that some of the text-writers who have incorrectly said that it is necessary that the consideration should appear by the writing where the contract comes within the 4th section of the statute, but not where it comes within the 17th, had reference to the necessity, not, strictly, of mutuality, but of an allegation as to the *mutual promises* of the parties, in order to show the consideration. But, if this is their meaning, a comparison of Egerton *v.* Mathews, 6 East, 307, with Studt *v.* Lill, 9 East, 348, — the converse of Wain *v.* Warlters, 5 East, 10, — should have shown them the incorrectness of that view. See Detroit, &c. R. R. Co. *v.* Forbes, 30 Mich. 165, at p. 176, where, notwithstanding the statutory provision to which we have referred, that the consideration for the contract, within the statute, need not appear in the writing; it is doubted, as to whether, where the only consideration for the defendant's promise is the promise or undertaking of the plaintiff, and that is one which, to be valid when made, must be in writing, a mere verbal promise, which is not in its validity, would of itself constitute sufficient consideration for the promise of the defendant, so as to render the latter binding at the time it is made; on the ground that there would be a want of mutuality.

The defect in the memorandum of the contract, in Grace *v.* Davison,[1] signed by the party whom it was sought to charge,

[1] 114 Mass. 16.

was not with reference to the subject-matter of the sale, but as to the mode of payment of the consideration money, and the

which is generally essential to the validity of contracts. Some such consideration as this seemed to be in the mind of Lord Ellenborough, in Wain *v.* Warlters, 5 East, 10, and, at first, at *nisi prius*, in Egerton *v.* Mathews, 6 East, 307, and would seem to go to all cases within the purview of the statute. But the actual decision in the latter of these cases; in Stadt *v.* Lill, 9 East, 348, and in the other cases following these, has established, that, as the statute requires that the note or memorandum in writing should be signed by only the party to be charged, it will be effectual within the statute, if it show on its face, by fair inference, the whole contract, *i. e.*, what both parties are to do under it, even though the writing furnished legal evidence to allow of the enforcement of the contract by but one party to it only. See Hall *v.* Soule, 11 Mich. 494. In James *v.* Muir, 33 Mich. 223, it would seem that the court inclined to the view (see pp. 227, 230), notwithstanding the provision that the consideration of the contract of sale need not appear in the writing, that, at least where a price is agreed on, the memorandum should show the price, as well as "*all the other terms of the contract*, and especially must show that it is a contract of sale." In Howell's Annotated Statutes (Mich.), 1606, n., it is stated as the holding of the court in James *v.* Muir, 33 Mich. 223, that "A memorandum or contract of sale for the price of fifty dollars or more, *must show all the terms of a complete agreement of sale*. And, if the contract is executory, the price must be named, as well when a reasonable price as when any other is agreed upon." If, in the case, the sale had been by auction, under sec. 6187 (old sections 3185, 4700), which requires "the nature and price of the property sold, the terms of the sale," etc., to be set out in the note or memorandum, it would seem difficult to hold that such note or memorandum would be good where these items were not set out, notwithstanding the section which provides that "the consideration" need not be expressed in the writing. But, from the apparent holding of the court in James *v.* Muir, 33 Mich., 223, they would seem to imply, notwithstanding that section, that *in all cases of sales*, the price as well as "all the other terms of the contract" must appear in the writing. This, as we have shown, is the law under the English statute, and under analogous statutes to it; and, in the Michigan statute, as well as by many of the law writers, the "consideration" of a contract of sale must be construed as something in some way entirely outside of the contract, not covered by that which is purchased, or that which is to be paid, or the terms of the contract, which, with the parties to it, shows the entire contract. What this undefined something is, whether mutuality, or "motives and inducements," or "motives and considerations," is not, by any means, clear. Certainly, it seems to us, whether the contract be within the 4th or 17th section of 29 Car. 2, c. 3, the note or memorandum in writing signed by the party to be charged must be a note or memorandum of the entire contract, and equally so under the 17th section as under the 4th; the very respectable authorities in England and in this country, to whom we have previously referred, to the contrary, notwithstanding.

In McElroy *v.* Buck, 35 Mich. 434, the court expressly adhered to the decision in James *v.* Muir, 33 Mich. 223, by which they held the case of McElroy *v.* Buck was governed. In this case the verbal agreement was for the sale of a double-deck car of hogs at 5 cents *per* lb., payable on or before August 25. The consideration for the hogs was, therefore, the 5 cents *per* lb., payable on or before August 25, as the consideration in Egerton *v.* Mathews, 6 East, 307, for the 30 bales of Smyrna cotton purchased, was the 19*d.* *per* lb., — to be paid "as soon as our certificate is complete." The memorandum in writing in McElroy *v.* Buck, 35 Mich. 434, signed by the party to be charged, showed the subject of the purchase, — "I will take double-deck car hogs," — but did not show the other part of the verbal contract, the consideration, or price to be paid for the hogs. If the price had been shown, the whole contract would have appeared in writing, as in Egerton *v.* Mathews, 6 East, 307. But, as the Michigan statute provides that the consideration of the contract need not be expressed in the writing, "but may be proved by any other legal evidence," and as the consideration of the contract was proved by verbal evidence, the court below held that the statute was satisfied. But the Supreme Court of Michigan reversed the decision, and held that, as "*the substance of the bargain*" *was not shown*, the statute was not satisfied. As the substance of a bargain or contract of sale can only be shown by showing what is to be given for that which is to be received, under the decisions in James *v.* Muir, 33 Mich. 223, and McElroy *v.* Buck, 35 Mich. 434, it does seem difficult to give much force or

defect, under the Statute of Frauds, was held fatal. The memorandum there relied on was as follows: "Boston, February 18, 1873. Received from J. J. Grace the sum of fifty dollars, as part payment of house No. 2, Hayward Place, sold to him on this day for ($25,000) twenty-five thousand dollars, and mortgage to remain at five per cent. for five years. Charles H. Davison." The court said: "The memorandum of agreement indicates that a part of the purchase-money was agreed to be secured by mortgage of the premises to be conveyed. But it does not disclose nor furnish any means for the court to ascertain what part or amount is to remain upon mortgage, and what paid in cash upon delivery of the deed. *The Statute of Frauds does not permit such a contract to be enforced without a memorandum of it in writing, signed by the party to be charged.* The court cannot, therefore, go outside of this writing to ascertain what the real agreement of the parties was in this particular. The writing being incomplete *in one of its essential terms*, and the court having no means to which it can lawfully resort to supply the defect, specific performance must fail."

The courts of the State of Maine affect to follow and approve of the confessedly *extra-judicial* reasoning of the Massachusetts court, in Packard *v.* Richardson.[1] Gilligan *v.* Boardman[2] is usually cited as an authority for this.[3] While, however, it is said in this case that the doctrine of the English courts is, as we have seen, that as there must be a note or memorandum in writing of the whole contract, bargain, or agreement, within the fourth or seventeenth section of the statute, in order to bind the party whom it is sought to charge thereunder; therefore, where there is an omission of one side of the contract in the note in writing, the statute is not complied with; yet Gilligan *v.* Board-

effect even to such an express enactment as that of the Michigan statute, without, in effect, holding that the section of the statute requiring written evidence, in any contract for the sale of goods, of *the bargain*, has been, in fact, repealed. And see Wilkinson *v.* Heavenrich, 58 Mich. 574, where it was held that, where a promise is the consideration for a promise, and there was not the necessary evidence in writing of the plaintiff's promise, the defendants were not liable on their promise, within the statute, although they had signed a note or memorandum of the entire undertaking, as far as their part of it was concerned. And see Palmer *v.* Marquette & Pacific Rolling Mill Co., 32 Mich. 274, where the defendants signed a memorandum in writing, agreeing to give the plaintiff a specified salary, the plaintiff showing, by parol, that his services were to be the consideration for this "promise;" but the court held, notwithstanding the statute provides that the consideration for the "promise" "need not be expressed in the written contract, agreement, or *promise*, or in any note or memorandum thereof, but may be proved by any other legal evidence," that the plaintiff on such evidence could not recover. It does, indeed, seem difficult to frame a satisfactory note or memorandum of a contract, bargain, or agreement, which does not show a contract, bargain, or agreement, but only one side of it.

[1] 17 Mass. 122.

[2] 29 Me. 79.

[3] See 3 Pars. on Con. 16, n. *z*; Browne on Stat. of Frauds, § 391. And see Bird *v.* Monroe, 66 Me., at p. 342.

man is not, itself, like Packard *v.* Richardson,[1] a very clear authority on the question.

In Gilligan *v.* Boardman, the holder of the promissory note of a third person sold it, with a verbal guaranty of its payment, and the court held, not only that, as the guaranty was made at the same time with the principal contract, there was a sufficient consideration for the guaranty, — the consideration of the principal contract being a sufficient consideration for the guaranty;[2] but that, it was not the note alone, but the note with the guaranty, which constituted the consideration of purchase by the plaintiffs. Then, on the doctrine established in England and in this country, that where there is a new consideration of benefit or harm moving between the newly contracting parties, the contract is an original, and not a collateral one; therefore, according to the holding in Gilligan *v.* Boardman,[3] itself, that case was not within the Statute of Frauds.

The first case on the subject we find decided in the State of Maine does, in fact, we think, follow the sound decisions of the English courts in holding that the writing signed by the party to be charged "*should contain the whole agreement*," "*so far as it is intended to affect the party to be charged.*"[4]

Freeport *v.* Bartol[5] was the case of a sale of church pews (made real estate by statute in Maine), within the equivalent of the fourth section of the English Statute of Frauds. The defendant signed memoranda showing the purchase by him of two specific pews. But it was held, that, as there was another writing, showing the terms of sale, not signed by the defendant, nor connected by any written evidence with the writings signed by him, the statute was not satisfied. Here, the price and terms were, in effect, the consideration for the defendant's promise;[6] and although the price appeared in the memoranda, signed by the defendant, together with the subject-matter of the sale, it was held, that, as the whole terms did not appear in the writing signed by the defendant, the writing did not satisfy the statute.[7] However, in

[1] 17 Mass. 122.

[2] Huntress *v.* Patten, 20 Me. 28.

[3] 29 Me. 79.

[4] Freeport *v.* Bartol, 3 Me. 340, at p. 345.

[5] 3 Me. 340.

[6] See the preceding case stated, in the Supreme Court in Maine, of Gilligan *v.* Boardman, 29 Me. 79, where it was held that the transfer of a promissory note and a guarantee of its payment were both the consideration for the purchase of the note.

[7] It was strongly contended in this case that the contract could not be enforced for want of mutuality, the plaintiffs not having signed the writing. The court considered it unnecessary to consider this point, as they held, although the subject-matter was sufficiently described, and the price stated in the writing, signed by the defendant, that all the terms affecting the party to be charged must appear by the writing, signed by him; *ergo*, that the consideration must appear in and by the writing. The court said, very much in the language of the English courts: "The defendant signed a paper, a copy of which makes a part of this case; but that

Levy *v.* Merrill,[1] and again in King *v.* Upton,[2] it was held, in the case of the promise to pay the debt of another, that the consideration for the collateral undertaking,[3] to satisfy the Statute of

paper proves *no agreement*, sets forth no terms or conditions, and is altogether defective *as evidence of a contract*. It is in proof that there did exist, at the time of the defendant's subscription, a paper, now lost, in which the terms and conditions of sale proposed by the plaintiffs were clearly and distinctly set forth; but the paper signed and produced has no reference to the paper lost. Its connection with it, therefore, can only be shown by parol evidence, which, we are clearly of opinion, is inadmissible under the statute. The instrument signed, or others to which it refers, and which are thereby made a part of it, *should contain the whole agreement*; at least, so far as it is intended to affect the party to be charged. *The admission of parol testimony to make out and complete such agreement would defeat the object of the statute*, which was intended, by the exclusion of testimony of this description, to lessen the facilities as well as the temptation for the commission of fraud and perjury." This we deem in direct antagonism to the doctrine of those cases which hold that the whole of the agreement, outside of the question of mutuality, need not appear in the written note or memorandum which the statute requires, of the contract, bargain, or agreement, *i.e.*, *of the whole* of the contract, bargain, or agreement, outside of the mutuality. In Freeport *v.* Bartol, 3 Me. 340, 345, the case of Boydell *v.* Drummond, 11 Ves. 142, 147, was approved and followed, in which latter case the defendant had subscribed a memorandum in writing for the purchase of the subject-matter of the contract, but it was contended that "the whole contract not having been reduced to writing, and signed by the parties, etc," it was void within the Statute of Frauds. And so it was held.

[1] 4 Me. 180, 189.

[2] 4 Me. 387.

[3] It will be noticed that the holding in Levy *v.* Merrill, 4 Me. 130, and in King *v.* Upton, 4 Me. 387, only goes the length of holding, not that the consideration for none of the bargains, contracts, or agreements, required by the 4th or 17th section of the English statute of frauds, need appear by the writing, but only that the consideration for the collateral undertaking to pay the debt of another need not so appear. It is, too, upon this clause of the 4th section that Packard *v.* Richardson, 17 Mass. 122, is purported to be decided. In *Ex parte* Minet, 14 Ves. 189, Lord Eldon, too, treated this clause of the statute relating to the special promise to pay the debt of another as being exceptional, on the ground that "the undertaking of one man for the debt of another does not require a consideration *moving between them*;" *i. e.*, between the promisor and promisee. But, notwithstanding this, the learned Lord Chancellor lost sight of the fact that a special promise to pay the debt of another, like any other contract, bargain, or agreement, is yet invalid *without a consideration* to sustain it. And, although such consideration may be anything of detriment to the promisee, as well as it may be anything of benefit to the promisor, if the effect of the statute is that the whole contract involved in the special promise has to appear in the writing, as well as the contracts, sales, or agreements otherwise named in the 4th section, or the contracts or bargains named in the 17th section, then it is clear that the consideration has to appear in the writing as much under one of the clauses of the 4th section as under either of the others. See the subject ably considered by Abbott, C. J., in Saunders *v.* Wakefield, 4 B. & Ald. 594, 599, from whose masterly judgment on the subject we have fully quoted, *ante*, 517, n. 1. It will be noticed that the amendment to the English statute of frauds by the Mercantile Law Amendment Act, 19 & 20 Vic. c. 97, providing that the consideration for the "promise" "need not appear in writing, or by necessary inference from a written document," only goes to the clause of the 4th section of the statute of frauds relating to the special promise to pay the debt of another. And, as we have pointed out *supra*, there might be grounds for sustaining even what we think are the badly reasoned cases of Packard *v.* Richardson, 17 Mass. 122; Levy *v.* Merrill, 4 Me. 182; King *v.* Upton, 4 Me. 387; and analogous cases, without at all justifying the view that, therefore, a note or memorandum in writing under other clauses of the 4th section, of contracts, sales, or agreements; or, under the 17th, of contracts or bargains, would be good, which did not, directly or by fair inference, show the entire contract; which, of course, it could not do if it omitted any of the essential terms which went to, or were a part or the whole of that which is absolutely necessary to constitute a contract, bargain, sale, or agreement, — the consideration.

Frauds, does not require to appear in the note or memorandum in writing, signed by the party to be charged.

Levy *v.* Merrill [1] and King *v.* Upton [2] rest on Packard *v.* Richardson,[3] which case, in its turn, rests largely on the views expressed by Lord Eldon in *Ex parte* Minet,[4] and in *Ex parte* Gardom;[5] both of which cases were undertakings to pay the debt of another. But, as is well pointed out in Saunders *v.* Wakefield,[6] in each of these cases there was a memorandum in writing signed by the party to be charged, from which, by fair inference, a consideration did appear in the writing. In *Ex parte* Minet,[7] there was the consideration of future advances to sustain the promise, and in *Ex parte* Gardom,[8] future supplies of goods.[9]

[1] 4 Me. 180, 189.
[2] 4 Me. 387.
[3] 17 Mass. 122.
[4] 14 Ves. 189.
[5] 15 Ves. 286.
[6] 4 B. & Ald. at p. 597.
[7] 14 Ves. 189.
[8] 15 Ves. 286.
[9] There is a striking similarity between the guaranties in these cases and that in Stadt *v.* Lill, 9 East, 348, where the court, of which Lord Ellenborough was chief justice, and sitting in the case, and which had decided Wain *v.* Warlters, 5 East, 10, and Egerton *v.* Mathews, 6 East, 307, held that the guarantee sufficiently showed the consideration to satisfy the statute. The guaranties in Stadt *v.* Lill, 9 East, 348, and in *Ex parte* Gardom, 15 Ves. 286, were virtually identical. In the former the guarantee was, "I guarantee the payment of any goods which J. Stadt *delivers* to J. Nichols;" in the latter, "We agree and engage to guarantee for what twist Thomas Tapp may *purchase* from you from the 28th ult. to the 1st of January." The latter guarantee, in fact more clearly, in the use of the term "purchase," instead of "deliver," in Stadt *v.* Lill, 9 East, 348, showed the contract of sale for which the guarantee was given. Stadt *v.* Lill, 9 East, 348, decided by the Court of Queen's Bench, in which Lord Ellenborough sat as chief justice, and *Ex parte* Gardom, 15 Ves. 286, decided by Lord Eldon, were both decided A. D. 1808, and were therefore virtually concurrent, and are in perfect harmony with each other. True, in *Ex parte* Gardom, 15 Ves. 286, Lord Eldon said that he had always taken the law to be clear until Wain *v.* Warlters, 5 East, 10, was cited, that, if a man agreed in writing to pay the debt of another, it was not necessary that the consideration should appear on the face of the writing. But he yielded to the decision of that case, and admitted that it had "*determined* two points, — first, that a consideration is necessary; secondly, *that it must appear upon the writing.*" But, further, it seems that Lord Eldon did not there clearly distinguish between the consideration (the future sales of the goods to Tapp) and the mutuality (the plaintiff's agreement to sell the goods to Tapp); as he says, "It is exceedingly difficult to distinguish this from that case [in Wain *v.* Warlters, 5 East, 10, there is the mere promise, for which no consideration whatever appears in the writing]; as for this engagement to be answerable for any twist which the petitioners should supply to another person, there is no consideration; unless as it may be proved by parol evidence that they did agree to furnish twist." But, in Stadt *v.* Lill, 9 East, 348, where Lord Ellenborough seemed to have been disabused of the view which he too seemed to have had in Wain *v.* Warlters, 5 East, 10, and at *nisi prius*, in Egerton *v.* Mathews, 6 East, 307, that the consideration and the mutuality were the same, he said, with reference to the consideration, which was as applicable to *Ex parte* Minet, 14 Ves. 189, and to *Ex parte* Gardom, 15 Ves. 286, as to Stadt *v.* Lill, 9 East, 348, that the stipulation as to the delivery of the goods to the third party was a consideration appearing on the face of the writing, and when the delivery took place the consideration attached. Lord Ellenborough so directed the jury, and in so doing was sustained by the full court. And in *Ex parte* Gardom, 15 Ves. 286, Lord Eldon, while holding that the "agreement," as an agreement to pay the debt of another, was "*an agreement* within the meaning of the statute," must have also held (see p. 289) that the consideration did appear by the writing, as he held that the guarantors were bound by their guaranty. In one of the very admirable notes of the late Mr. Sumner to Vesey's reports, it is correctly said: "In *Ex parte*

By the statutes of Maine[1] it is enacted, that the consideration for the special promises, contracts, and agreements, named in the first section (which includes the clauses in the fourth section of 29 Car. 2, c. 3) need not be expressed in the writing, but may be proved otherwise;[2] leaving the fourth section, which is similar to the seventeenth section of the English act, without the addition of any such clause. But, in Bird *v.* Munroe,[3] it is stated generally, independent of the statute, as it is said in Gilligan *v.* Boardman,[4] that, in Maine, "the consideration for the promise is not required to be expressed in writing." Notwithstanding this, however, we think a critical examination of the decisions in Maine will show, as they do in Massachusetts, that they do not really mean this; but, rather, that they are confounding the mutuality of a contract with the consideration.[5] And, in fact, taking all their decisions

Gardom, 15 Ves. 287, it was held that a sufficient consideration did appear." Altogether, then, we are clearly of the opinion that the reasoning (?) in such cases as Packard *v.* Richardson, 17 Mass. 122, Levy *v.* Merrill, 4 Me. 180, and King *v.* Upton, 4 Me. 387, is unsupported, either on principle or authority.

[1] R. S. of 1871, p. 786; R. S. of 1883, p. 838; c. 111, §§ 1, 4.

[2] It is incorrectly stated in Williams *v.* Robinson, 73 Me. at p. 192, that, although this provision is contained in the R. S. of Maine of 1840, c. 136, § 2, and in the R. S. of Maine of 1857, c. 111, § 2, it was repealed, and was not included in the R. S. of 1871. It is, however, included both in the revisions of 1871 and 1883, but is made a part of the first section in each of these revisions, instead of being an independent section (the second), as it was in the revision of 1857. But in the revision of 1857, as in those of 1871 and 1883, it was only applied in the statute to the contracts, etc., in the first section (the English fourth), and not to those in the fourth (the English seventeenth). But the question in Williams *v.* Robinson, 73 Me. 186, came up under the fourth section (the English seventeenth) of the Maine statute, and not under the first (the English fourth).

[3] 66 Me. at p. 342.

[4] 29 Me. 79.

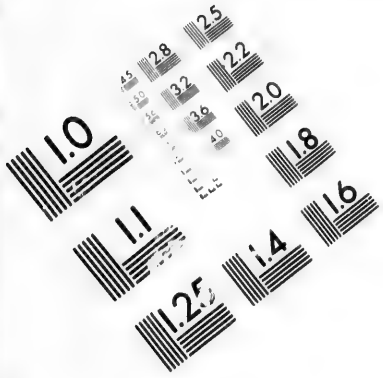
[5] It may perhaps be necessary to observe that where there is no mutuality, no *aggregatio mentium*, or meeting of minds, there is, of course, no contract; and where there is no contract there are, of course, no mutual considerations. But the consideration for a contract, *i. e.*, what one is to receive for that which he is to give, may appear in the writing, or by fair inference from it, and yet the mutuality, which is also necessary to make a binding contract, not appear in or by the writing. This was the case not only in Egerton *v.* Mathews, 5 East, 10, and Stadt *v.* Lill, 9 East, 348, but in such cases as *Ex parte* Minet, 14 Ves. 189, and *Ex parte* Gardom, 15 Ves. 287. In all of these cases, and in innumerable other well-decided cases, the consideration appeared in and by the writing, or by fair inference from it; but the mutuality did not so appear, but had to be shown *dehors* the writing. The theory of all these cases is that of the statute itself, without the exception of any clause either of the fourth or seventeenth section; that the contract, bargain, or agreement (*i. e.*, the whole contract, bargain, or agreement), or some note or memorandum of it (*i. e.*, some note or memorandum of *the whole* contract, bargain, or agreement), must appear in the writing. But as this writing need only, to be binding, be signed by the party to be charged thereby, it need not be signed by the other party to it, and hence his assent to it — to make the necessary mutuality — may be shown, as it could have been at common law before the statute, by evidence *aliunde*. Keeping in mind this distinction, and the assumed difference — outside of the one improperly treated exceptional case of a promise to answer for the debt, default, or miscarriage of another — between the English cases and very many of the cases in Massachusetts, Maine, and in the other courts which have assumed to follow the confessedly *obiter dicta* in Packard *v.* Richardson, 17 Mass. 122, will entirely disappear; these latter, as do the English cases, in effect holding that *all the terms of the contract*, outside of the matter of the mutuality, must appear in and by the writing, or by fair inference from it. See Bean *v.* Burbank,

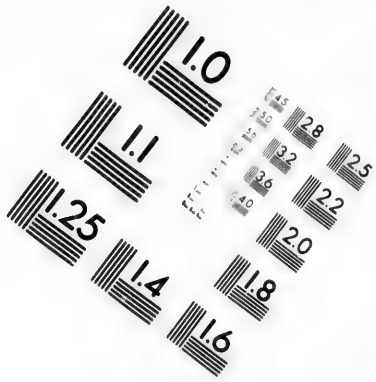
into consideration, and making due allowance for their error in elementary law, it is questionable if (perhaps not including the case which has to some extent, under the Statute of Frauds, been for some insufficient reason treated as exceptional, — the promise to answer for the debt, default, or miscarriage of a third party) the decisions in Massachusetts, Maine, and the other States which affect to follow the vicious reasoning in Packard *v.* Richardson,[1] in their repudiation of the law as well decided by Wain *v.* Warlters,[2] at all differ in principle from the well-decided English cases of Egerton *v.* Mathews,[3] Stadt *v.* Lill,[4] and the long and unbroken series of English cases, which have followed, approved and affirmed the well-decided law of Wain *v.* Warlters,[5] Egerton *v.* Mathews,[6] and Stadt *v.* Lill.[7]

Thus, in Horton *v.* McCarty,[8] where the question came up under the clause relating to the sale of lands, after referring to a memorandum which had not been duly signed, which contained "a description of the premises, the time and place of sale, the name of the seller, the terms, and the name of the defendant as purchaser," as being "undoubtedly sufficient, if seasonably made," to charge the defendant, Kent, J., delivering the unanimous judgment of the Supreme Court of Maine, says: "A mere writing down on a slip of paper of the name of the purchaser and the price, the paper containing nothing else, and connected with no other papers, *is not a signing of a contract*, within the meaning of the statute. The rule of law has been sufficiently relaxed by the decisions, but it is not entirely dispensed with. The general rule is that the paper or book signed *must contain the essential terms of the contract*, with such a degree of certainty that it may be understood without recourse to parol testimony." It is clear that the writing of a name and a sum on a slip of paper, which contains no reference to the sale and its terms, or to the description of the property, is not sufficient: Freeport *v.* Bartol,[9] Morton *v.* Deane.[10] That the writing signed by the party to be charged "must contain the essential terms of the contract," *i. e.*, *all* the essential terms of the contract, is what the statute itself requires; and this holding, even in the State of Maine, accords with the unbroken line of the English decisions, and with the well-decided cases in this country in harmony therewith.

16 Me. 458, where it was held there was no consideration for want of mutuality; but where, had there been evidence of mutuality, the consideration would have sufficiently appeared in the writing signed by the party whom it was sought to charge.

[1] 17 Mass. 122.
[2] 5 East, 10.
[3] 6 East, 307.
[4] 9 East, 348.
[5] 5 East, 10.
[6] 6 East, 307.
[7] 9 East, 348.
[8] 53 Me. 394.
[9] 3 Greenleaf, 340.
[10] 13 Met. 35.





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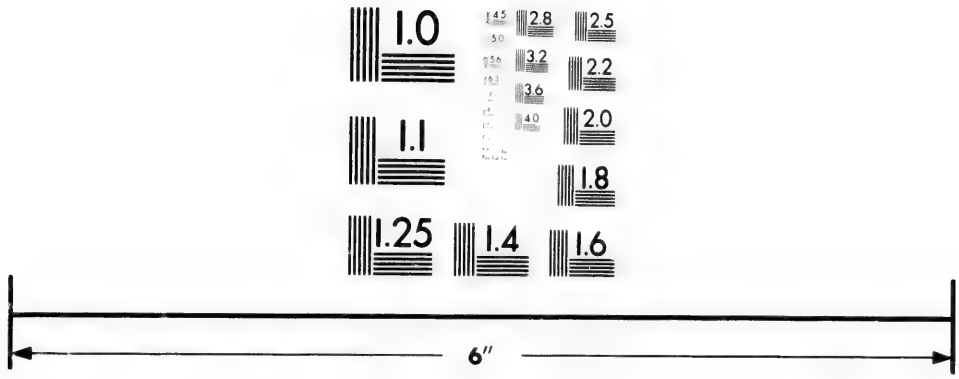

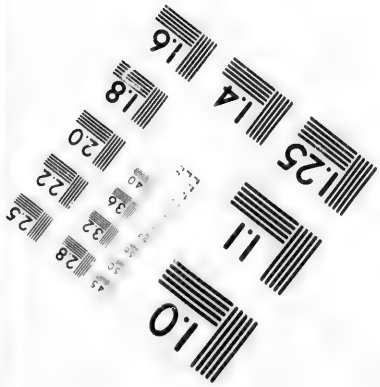

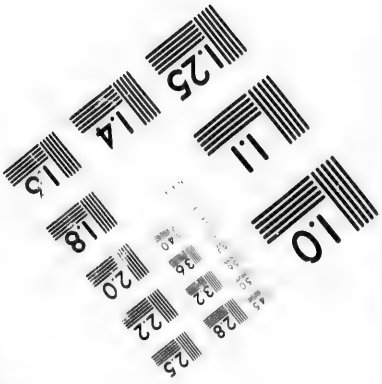

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In the case of Cummings *v.* Dennett[1] the action was against the seller of a quantity of belting leather for not delivering it. The memorandum of the contract in writing showed the consideration as plainly as in any of the English cases to which we have referred; but, as in them, the mutuality did not appear. In the Maine case the mutuality and the consideration were confounded. The note or memorandum in writing, signed by the party to be charged, was as follows: "I, the subscriber, hereby agree to furnish David Cummings with one hundred and forty backs and strips for belting, to be delivered in Portland, *at eighteen cents per pound*, by the first day of December next."

Here, right on the face of the writing, the consideration, as in the English cases, — the leather for the price, the price for the leather, — is shown; but, as in the English cases, the mutuality does not appear. But, as has been held in those cases, *that*, under the statute, can be shown *dehors* the writing. The case in Maine is decided precisely as it would have been in England, or in those States where the gross elementary mistake of Massachusetts, Maine, and a few other States, has not been made, of confounding the consideration with the mutuality. Thus in Cummings *v.* Dennett,[2] instead of its being claimed for the plaintiff that "all the essential terms of the contract" (outside of the mutuality, which the statute, fairly and universally so construed, does not require to be evidenced by the writing), including, of course, the mutual considerations, without which "a contract" could not be shown, did appear on the very face of the writing; it was contended that "it is not necessary that the consideration of an agreement should be stated in it to make it binding. The consideration may be proved by parol."

So, in the unanimous judgment of the court, delivered by Whitman, C. J., the position is not taken, as it should have been, that the consideration is stated as plainly as in any case which, under the statute, has ever been upheld, including either or any of all the English cases to which we have referred in this Part, and that the mutuality is not required to be shown by the writing; they, on the other hand, treating the being mutually bound by the contract as being absolutely essential, not to the making of a contract, but to the showing, independent of this, that there is a consideration, utterly ignore the admission of a consideration by the party to be charged, shown on the face of the writing or by a fair inference from it.[3] Thus the conclusion is obvious that, *in all this class of*

[1] 26 Me. 397.
[2] *Ibid.* 397, 398.
[3] The following language of Whitman, C. J., will make clear the fallacy into which such courts as those of Massachusetts, Maine, etc., have fallen: "The

cases, there is not a particle of difference between the actual holding of the courts in England or elsewhere, which hold that the

plaintiff relies upon a special contract, entered into between him and the defendant, in which the defendant in writing agreed to furnish the plaintiff with one hundred backs and strips for belting, to be delivered in Portland by the first day of December then next, the date of the writing being Sept. 6, 1845, at eighteen cents per pound. The plaintiff on the first day of December following the date of the writing, tendered to the defendant, at his tannery in Portland, the amount the articles would come to at the price agreed upon, and demanded them of him; to which he replied that he had not the leather. He did not deny that *he had made such an agreement;* or then pretend *that it was not mutually obligatory;* or that the plaintiff *had not agreed to take and pay for the articles upon their being furnished according to promise.* He now sets up, however, in defence, *that the written agreement does not show that the plaintiff did so agree; and, therefore, that there was no consideration for the promise he had made;* and, moreover, that there being *no written promise on the part of the plaintiff to accept and pay for the articles, at the time specified, and, therefore, no mutuality of obligation,* the statute of frauds will prevent his being liable in this action.

"If the defendant's promise can be regarded as having been made without consideration, it will be immaterial to inquire whether it is within the statute of frauds or not. It is not essential, at common law, that the consideration for a promise in writing should appear in the writing itself. Bean *v.* Burbank, 16 Me. 460. To ascertain whether there was a good consideration, not only the writing, but all the circumstances connected with it must be taken into view.

"In the case before us, *the writing contains the promise of one party in very explicit terms;* and the question is, *whether a corresponding promise* [*i. e.* whether, not that for which the promise is made is ascertainable, but whether the mutuality appears] is or is not ascertainable, *as having been made by the other party,* and *thereby constituting a good consideration for the other.* The agreement by the defendant was absolute to furnish, *at a certain time, place, and price, certain articles* [thus, of course, "all the essential terms of the contract" being shown]. The agreement was in writing, which was taken and carried away and held by the plaintiff. The defendant, it would seem, was a manufacturer of such articles, as the tender was made at his tannery, and he is called in the writ, and without objection by him, a tanner. They were to be furnished at a future day; and, therefore, may be believed not to have been on hand at the time of the contract. It did not occur to the defendant at the time the tender was made, to pretend, *that there had not been a mutual and obligatory contract* [mutuality again!] *by one party to furnish, and by the other to pay for the articles.* The tender was made for articles the defendant 'agreed to have done' for the plaintiff; and the defendant did not deny that he had so agreed. Here, then, there was at least matter for the consideration of the jury, *from which to find a mutual and obligatory contract between the parties.*

"If the application was to the defendant for goods on hand, then it will, perhaps, become important to ascertain whether the writing in question was in conformity to the requirements of the statute. *The promise, on the part of the defendant, was quite intelligible, and the consideration expected for the promise is stated.* [Mark this important admission, which is really an assent to the correctness of the English decisions, from which the courts in Massachusetts, Maine, etc., affect to differ.] And we have before seen, that a jury might well find, from the circumstances, that the plaintiff promised to take and pay for the articles to be furnished; and we have before seen that the law does not require that the party seeking the fulfilment of a promise in writing, should show that *the engagement on his part* [*i. e.* to show the mutuality] *forming the consideration* [!] was in writing. And to this point, see Lunt *v.* Padelford, 10 Mass. 230; Train *v.* Gold, 5 Pick. 380."

The mistake made in all this, as in the other cases in Massachusetts, Maine, etc., is in treating the *consideration* as though it were itself that of which it is but an ingredient; the contract or *agreement.* The definition of a contract is. An agreement between two or more parties to do or not to do some particular thing. But the consideration for the contract or agreement is not the agreement itself, but that which one party to the agreement receives or is to receive, or does or is to do, *for that* which he gives or is to give, or which is done or is to be done. The *mutuality* makes the agreement, of which *the consideration* is but an ingredient. And in the exceptional case of that kind of a contract called a gift, not even that. The question under the statute is whether the consideration, that is, what the one gets for that which the other gives — the *quid pro quo*

consideration must appear in and by the writing, signed by the party to be charged, but that the mutuality may be shown by evidence *aliunde*, and the holding of such courts as those of Massachusetts and Maine, that "*all* the essential elements of the contract," including, of course, the consideration, must appear in the writing, but that the mutuality — "a mutual and obligatory contract between the parties" — *which they call the consideration*, may, in the language of their statutes, where consideration is also, in effect, treated as mutuality, "be proved otherwise." This being so in all such cases as Cummings *v.* Dennett,[1] is conclusive also to show that, in all such cases as Packard *v.* Richardson,[2] the promise to answer for the debt, default, or miscarriage of another, should not be treated as exceptional; but that the statute as much requires the consideration to appear in and by the writing, or by fair inference from it, as it did in Stadt *v.* Lill,[3] in all such cases, as in any others under either the fourth or seventeenth section of the statute. On principle, as well as on sound authority, in all the cases under the fourth or seventeenth sections of the statute, *the consideration must appear in and by the writing, or by fair inference from it*, signed by the party to be charged; but in none of them need the mutuality so appear, but "may be proved otherwise." This, we claim, is the basilar principle of all these cases; and the cases not decided in harmony with it are not well decided, and hence are not law in Maine, Massachusetts, or elsewhere.

In Washington Ice Co. *v.* Webster,[4] the subject-matter of the contract, ice, appeared in the writing which was signed by the party whom it was sought to charge, but the consideration did not appear in the writing or by fair inference from it. The court held that "*the contract of sale*, to be binding by the Statute of Frauds, *must be in writing*," and that a writing that did "not describe the price or the quantity of the goods to be sold, nor contain any of the elements of a sale," did not satisfy the statute. This case, in effect, virtually holds the doctrine of the previous Maine case,[5] as well as of all the English and other well-decided cases on the question, that all the requisites of the contract, except the mutuality, must appear in the writing or by fair inference from it.[6]

— sufficiently appears in the writing or by fair inference from it; not whether the mutuality also so appears.

[1] 26 Me. 397.

[2] 17 Mass. 122.

[3] 9 East, 348.

[4] 62 Me. 341.

[5] Horton *v.* McCarty, 53 Me. 394.

[6] The Maine Supreme Court, Appleton, C. J., delivering their unanimous judgment, say: "*The contract of sale*, to be binding by the statute of frauds, *must be in writing*. Thus far, in the process of the negotiation between the parties, there has been no note or memorandum *setting forth the terms of any contract* which has been signed by the

The latest case (A. D. 1882) in the Supreme Court of Maine[1] is another admirable case to show the confusion of those courts, such as the Supreme Courts of Massachusetts, Maine, etc., which affect to hold that in no case under such sections as those of the fourth or seventeenth section of the 29 Car. 2, c. 3, is it necessary that the consideration should appear in the writing or by reasonable inference from it.

In this case the memorandum in writing of the contract, signed by the defendant, whom it was sought to charge thereby, was as follows: "I hereby agree to furnish M. F. Williams of New Haven, eight hundred to one thousand tons of ice, delivered on board vessels at Augusta, Maine, properly packed for a voyage to New Haven, *for the sum of two dollars a ton*."

Although right on the face of this memorandum the contract to deliver 800 to 1000 tons of ice "*for the sum of two dollars a ton*" was shown, it was claimed, on the trial, that the note in writing of the contract showed no consideration. And this was, in effect, conceded, not only by the presiding judge at the trial, but by the unanimous judgment of the Supreme Court of Maine, to be the case. And yet, while so affecting to hold, they, on the other hand, expressly held the very reverse, viz., that "In order that the court may ascertain the rights of the parties *from the writing itself*, without resort to oral testimony, to satisfy the statute, the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, *and all the essential terms and conditions of the contract*, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to, if any, without any aid from parol testimony."[2] Of course, it is ridiculous to hold, as they do, that there must be a complete memorandum of

party to be charged thereby." Washington Ice Co. *v.* Webster, 62 Me. at p. 358. And if "the terms of the contract" are required to be set forth, very clearly they are not set forth where one side of such terms — the consideration on which the contract is based — is entirely ignored.

[1] Williams *v.* Robinson, 73 Me. 186.

[2] For this they cite O'Donnell *v.* Leeman, 43 Me. 158; Jenness *v.* Mt. H. I. Co., 53 Me. 20; Horton *v.* McCarty, 53 Me. 394, 396; Washington Ice Co. *v.* Webster, 62 Me. 341. They also cite Riley *v.* Farnsworth, 116 Mass. 223, where the principle is also correctly laid down, although not affected to be acted on by the Supreme Courts of Massachusetts, Maine, etc., that "the memorandum in writing required by the statute of frauds *must contain all the essential terms of the contract*, so that the court can ascertain the rights of the parties from the writing itself, without resorting to oral testimony." In this case, which came under the section of the statute similar to the 4th section of the English act, and the clause of it relating to the sale of land; although the names of the parties were stated in the writing, the subject-matter of the sale, and the price to be paid, yet as all the terms of sale did not appear in the writing, it was held that the statute had not been complied with, notwithstanding the express statutory provision that the consideration, which really means all that is to be done by one for that which is to be done by the other, need not, under the Massachusetts statute appear in the writing, but may be otherwise proved.

all the essential terms of a contract, and yet that one-half of such essential terms may be omitted. They simply hold, in effect, that all the essential terms of the contract, including the consideration, must appear by the writing; but that the mutuality, or, as they also call it, "the acceptance of the contract," miscalling this also the consideration, need not appear by the writing. And so, in Williams *v.* Robinson,[1] the term "consideration" in the statute is simply, in effect, construed as "mutuality," or "the acceptance of the contract," by the party to the contract, who has not signed the writing by which the other party to it is bound, within the statute.[2]

[1] 73 Me. 186.

[2] As a fitting close to this class of cases, to show how thoroughly the courts of the State of Maine, as in Massachusetts, confounded the consideration with the mutuality, or "the acceptance of the contract," we quote from the judgment of the court below, which was sustained by the full court; thus: "The defendant claims that the memorandum is not valid and sufficient within the meaning of the statute, because it does not comprise, he says, *all of the essential elements and terms of the contract* which was, in fact, entered into by these parties. *In order that a note or memorandum should be sufficient and valid within the meaning of this statute, it is requisite that it should contain all of the essential elements and terms of the contract entered into by the parties.* And parol evidence, as has been ruled in this case, may be received, that is, the statements of the parties or their witnesses who were present at the time the contract was made, may be received to show that there was some other element in the contract, some other proposition or condition insisted upon by the parties, *by the one side or the other*, as essential, which was not, in fact, incorporated into the memorandum, and *in such case the memorandum would not be valid and sufficient within the statute of frauds, and the party could not be charged by it.* [That is, that the entire contract, with all its essential elements, constituting the reciprocal considerations, must appear in the writing, or the statute is not satisfied. And yet fancy its being laid down in this same case, as it was, that the consideration did not appear in the writing, and that it was not necessary that it should do so!] It is claimed here, on the part of the defendant, in the first place, that this is not sufficient, because, it is said, there was some discussion, — there was an agreement, in fact, it is claimed, between these parties, not appearing in this memorandum, *in reference to the mode and time of payment.* [And which, of course, would have been a part of the consideration.]

"Now, if you find, as matter of fact, under the evidence in this case, that there was an agreement between these parties in reference to the mode and time of payment, essentially and materially different from this presumption of law which I have explained to you; that that was insisted upon by the defendant *as an essential element of the contract, and made a condition of the contract; then that not appearing in this memorandum, I instruct you, as matter of law, that the memorandum would not be sufficient, and the defendant could not be charged by it.* [That is, that unless the consideration has been fully and correctly stated, the essential elements of the contract do not appear in the writing, and the statute is not satisfied. What can be plainer?] And you will consider what the evidence was in relation to that point; whether the agreement, if any agreement was made by the minds of these two parties mutually meeting upon any proposition, definitely, in reference to the mode and time of payment, was any different in effect [*i. e.*, has the consideration been insufficiently or incorrectly stated in the memorandum?] from this presumption of law, namely, cash on delivery, to which I have called your attention. And that does not mean delivery at West Haven, but means delivery according to the defendant's own proposition, 'on board vessel at Augusta.' If, therefore, you should find upon this rule of law, that this was a sufficient memorandum in that respect, then the defendant claims still further that there was no consideration for this as a contract. *None is expressed in it.* [Fancy! Compare the memorandum of the contract — the entire contract — in this case, as set out above, with the memoranda in writing, in the numerous cases *ante*, in this Part, where, both under the 4th and 17th sections of the statute, it has been held, from the time of Lord Ellen-

A final analysis of that class of cases in Massachusetts, Maine, and in those other States where it is affected to be held that the

borough, in Egerton *v.* Mathews, 6 East, 307, and Stadt *v.* Lill, 9 East, 348, down, that the consideration (often very much less clearly stated than in Williams *v.* Robinson, 73 Me. 186, where it is stated as clearly as it can be) sufficiently appeared in the writing, or by fair inference from it, and that the mutuality, the assent of the other party to the contract, need not so appear.]

"I instruct you, as matter of law, that if you find that the parties made this parol contract, that this plaintiff, by word of mouth, agreed [the assent to the contract, the mutuality] to pay two dollars per ton [the consideration] *for this ice* delivered on board ship at Augusta, *that parol agreement* [the mutuality] *to pay the price* on his part [the consideration] would be *a sufficient consideration for that contract* [not so! The "agreement" is the contract itself; the consideration is that which is to be paid — the *quid pro quo* — for that which is to be received], although it does not appear in this memorandum of the contract signed by the defendant, to be charged by it." The consideration appears; the mutuality does not appear, and, by the statute, does not require to appear in or by the writing.

The charge of the judge on the trial was, we think, dreadfully absurd; but the judgment of the full court seems to us even worse, if that is at all possible. The *contract itself* is an agreement; the *aggregatio mentium*, or meeting of minds; the mutual assent. The "legal consideration," on which the contract, the agreement, the assent, the mutuality is founded, is not the contract, the agreement, the assent, the mutuality; but it is the *quid pro quo*, — that which is to be done by one *for* that which is to be done by the other. Take, for instance, *a contract, an agreement*, by one to pay another the debt of a third person. The *agreement* by the one to do this, and by the other to assent to it, is the contract; the *aggregatio mentium;* the meeting of the minds. A necessary incident to this *contract* is the consideration. But that may be the giving of time; forbearance to sue; relinquishing a lien, etc. It is not the mutuality; the assent. That is the contract. But the consideration is that which sustains the contract; not the contract itself. The reciprocal considerations are the reciprocal subjects of the contract; the *agreement* with reference to them *is the contract.* The subjects of the contract — "*all* its essential requisites" — must be shown in the writing to satisfy the statute. The *aggregatio mentium*, the mutuality, need not so be shown, because that can, logically and finally, only be shown by both the parties to the contract signing the writing, and that the statute does not require.

Take, for instance, now, again, the case of Stadt *v.* Lill, 9 East, 348, which was a case under the 4th section of the statute, with reference to which it had been expressly held, in Wain *v.* Warlters, 5 East, 10, and under the same clause of the section, that the consideration must be expressed in the writing. In Stadt *v.* Lill it was held by Lord Ellenborough, and affirmed by the full Court of King's Bench, that, in that case, the consideration was stated. And this was the whole writing: "I guarantee the payment of any goods which J. Stadt delivers to J. Nichols." J. Stadt did not sign the writing, and there was nothing on the face of the writing to show any mutuality between the parties to the contract. That, under the statute, could be shown otherwise. But the consideration appeared; the payment to be made — the *quid pro quo* — for the goods to be delivered. And that case, and the preceding case of Egerton *v.* Mathews, 6 East, 307, under the 17th section, have been followed and approved since then in cases virtually without number. And yet the utterly nonsensical statement is made, as we have seen, in Williams *v.* Robinson, 73 Me. 186, 191, that, in a written note of a contract, that "I hereby agree to furnish W. 800 to 1000 tons of ice *for* the sum of $2 *per* ton," no consideration is expressed in the writing! Had there been in it the statement, "For, and in consideration of the sum of $2 *per* ton, to be paid me by W. on its delivery, I do hereby agree to deliver him 1000 tons of ice," while, as in Egerton *v.* Mathews, 8 East, 307; Stadt *v.* Lill, 9 East, 348, and the almost innumerable cases which have followed them, the mutuality would not appear, the consideration unquestionably would do so. Equally clear is it that, in Williams *v.* Robinson, 73 Me., the consideration for the defendant's undertaking does appear in the writing, as it does appear in those cases. With this explanation, surely, the merest tyro in law can see the absurdity, contradictions, and utter unsoundness of the reasoning of the full court in that case, in the following. They say: —

"At common law, while every simple contract, whether oral or written, must be founded on a legal consideration, it need

consideration (*i. e.*, that which one is to receive *for that* which he is to give) need not appear by the writing, in cases which come under such sections as the fourth and seventeenth of 29 Car. 2, c. 3, is a sufficient and conclusive demonstration of the utter unsoundness of those cases. Thus, as a perfect mass of contradictions, the following deductions result from those utterly inconsistent, illogical decisions: —

1. As regards the clause in the fourth section relating to the

not be expressed in the writing itself, for parol evidence is admissible to prove it. Cummings *v.* Dennett, 26 Me. 397; Bean *v.* Burbank, 16 Me. 458. Nor did the statute of frauds, even before the amendment expressly declaring it unnecessary, ever require the consideration to be recited in the note or memorandum signed by the party to be charged. Packard *v.* Richardson, 17 Mass. 122; Levy *v.* Merrill, 4 Me. 180, 189; King *v.* Upton, 4 Me. 387; Getchell *v.* Jewett, 4 Me. 350, 366; Gilligan *v.* Boardman, 29 Me. 91. In Bean *v.* Burbank, 16 Me. 458, and Vantassel *v.* Hathaway, 53 Me. 18, *no acceptance of the contract* [*i.e.*, the mutuality; treating *that* as the consideration] or *other* consideration was attempted to be proved.

"But while, as before seen, the memorandum need not necessarily mention the consideration, that being provable by parol testimony, nevertheless, *in order that the court may ascertain the rights of the parties from the writing itself, without resort to oral testimony* (Riley *v.* Farnsworth, 116 Mass. 223, 225, 226), *to satisfy the statute, the memorandum must contain within itself, or by some reference to other written evidence*, the names of the vendor and vendee, *and all the essential terms and conditions of the contract*, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to, if any, without any aid from parol testimony. O'Donnell *v.* Leeman, 43 Me. 158; Jenness *v.* Mt. H. I. Co., 55 Me. 20; Horton *v.* McCarthy, 53 Me. 394, 396; Washington Ice Co. *v.* Webster, 62 Me. 341."

If "all the essential terms and conditions of the contract" must appear in the writing, surely there cannot be the omission of the consideration — all of the terms and conditions of the contract on the part of one of the parties to the contract — and show a contract at all. So far was this correctly carried, even in the State of Maine itself, and in one of the above-cited cases (O'Donnell *v.* Leeman, 43 Me. 158), that, although the consideration was purported to be shown, as "*for* $1200, one third cash down," in the writing, yet, as the whole consideration was not stated in the writing, viz., "$1200; one third cash down, and the residue in equal payments, in one and two years," it was held that the writing was insufficient to satisfy the statute of frauds; and this, too, as the case was one of the sale of land, notwithstanding the express provision in the State of Maine statutes that the consideration need not be set forth or expressed in the writing! (see Rev. Stats. of Maine of 1840; p. 591; Rev. Stats. of 1857, p. 831); the court saying: "It is well settled that, unless there be a memorandum showing, within itself, or by reference to some other paper, *all the material conditions of the contract*, no action can be maintained upon such contract either in law or in equity."

But, in Williams *v.* Robinson, 73 Me. 186, 196, the Supreme Court of Maine went further, and expressly held that, in the writing, in that case, "Its terms are clearly expressed, *and contain all the elements necessary* to give *it legal effect as a written contract*"; of which, being an executory contract, a legal consideration was, unquestionably, one of such elements; and, with as little question, such consideration was "clearly expressed" on the very face of the "written *contract*." The palpable and utterly inexcusable blunder committed in all these cases, which propound the utterly untenable doctrine, as in the courts of Massachusetts, Maine, and a few of the other States which follow them, that, under such a statute as 29 Car. 2, c. 3, §§ 4 and 17, the consideration does not have to appear in and by the writing, or by necessary inference from it, results from their holding, in effect, that the consideration and the mutuality are synonymous; and, therefore, where the mutuality does not appear by the writing, that the consideration for the undertaking of the party signing the writing is not stated either. We think our examination of the Maine and Massachusetts cases themselves thoroughly demonstrates the unsoundness and actual absurdity of that long standing, utterly untenable theory, which has been allowed so long to pass without the emphatic condemnation which it should, at its very inception, have received.

special promise of one to answer for the debt, default, or miscarriage of another, they *do* hold that the consideration need not be expressed in the writing, signed by the party to be charged, or by necessary inference from it.

Thus, in all such cases as those represented by Wain *v.* Warlters,[1] Saunders *v.* Wakefield,[2] and their converse, Stadt *v.* Lill,[3] they hold that the mere naked promise in writing to pay the debt, is sufficient to satisfy the statute, without *either* the consideration or the mutuality appearing in or by the writing. Here, in effect, they distinguish the mutuality from the consideration. Under the English decisions, on this clause of the section, the holding is, as it is with reference to the other clauses of the fourth section and to the contracts or bargains under the seventeenth section, that the consideration must appear in and by the writing, or by necessary inference from it;[4] but that the mutuality need not so appear.[5] Thus, under the well-decided English cases, "I, A., promise B. to pay him C.'s debt," would show neither consideration nor mutuality; and would be no note or memorandum of a contract, bargain, or agreement, as required by the statute; but "I, A., promise to pay B. for advances to be made by him to C." shows the consideration, by fair inference; the future advances being a good consideration for the promise to pay for them. Here is a note of the whole contract to satisfy the statute; the mutuality, the assent to the contract, or the actual making of the advances, not being required, by the statute, to be shown by the writing. Again: "I, A., in consideration of B.'s forbearing to sue C., for six months, promise to pay him then, C.'s debt to him," is a note of the whole contract, so far as the statute requires it to be evidenced by the writing; and shows, by fair inference, the consideration; the forbearing to sue being a good consideration for the promise to pay the debt. But the assent to this contract by B., the mutuality, is not shown by the writing, the statute not requiring it to be so shown. But, "I, A., promise B. to pay him C.'s debt," although, on its face, being simply

[1] 5 East, 10.

[2] 4 B. & Ald. 95.

[3] 9 East, 348.

[4] See Wain *v.* Warlters, 5 East, 10; Egerton *v.* Mathews, 6 East, 307; Stadt *v.* Lill, 9 East, 348; Saunders *v.* Wakefield, 4 B. & Ald. 95, and the numerous other cases to the same effect cited in the first portion of this Part.

[5] See Laythoarp *v.* Bryant, 2 Bing. N. C. 735; Newbery *v.* Armstrong, M. & M. 389, *per* Tindal, C. J.: "The written agreement must show the consideration, but it need not show 'mutuality.'" And see Buckhouse *v.* Crosby, 2 Eq. Cas. Ab. 33; Seton *v.* Slade, 7 Ves. 275; Coles *v.* Trecothick, 9 Ves. 250; Tawney *v.* Crowther, 3 Br. Ch. Cas. 161, 318; Hatton *v.* Grey, 2 Br. Ch. Cas. 164; Lord Ormond *v.* Anderson, 2 Ball & Be. 370; Western *v.* Russell, 2 Ves. & B. 192; Allen *v.* Bennett, 3 Taunt. 169; Coleman *v.* Upcot, 5 Vin. Ab. 527; The Liverpool Borough Bank *v.* Eccles, 4 H. & N. 139; Mozley *v.* Tinkler, 1 C. M. & R. 692; Warner *v.* Willington, 3 Drew. 523; Smith *v.* Neale, 2 C. B. N. S. 67; Reuss *v.* Picksley, L. R. 1 Ex. 342.

nudum pactum, it is no note or memorandum of a contract at all, as required by the statute; showing neither directly, nor by fair inference from it at all, what the consideration is, — for that, as generally held, may be *anything* either of injury or detriment to the promisee or of benefit or advantage to the promisor, — is held, under the utterly unsound decisions of the courts of Massachusetts, Maine, and of those few other States following them, though neither a note or memorandum of a contract, nor showing consideration or mutuality at all, to satisfy the statute.

2. Hence, as above shown, as regards the clause in the fourth section, as to the special promise by one to pay the debt of another, they do clearly distinguish between the consideration and the mutuality; and do there hold, not confounding there the mutuality with the consideration, that, under that clause, the consideration need not be shown in the writing; and hence, under that clause, they do hold, right in the teeth of the statute, that neither the whole contract or agreement, nor a note or memorandum of the whole contract or agreement, nor "all the essential requisites of the contract" need appear in or by the writing signed by the party to be charged thereby, nor by fair inference therefrom.

3. But, directly opposed to this, with reference, clearly, to the clause in the fourth section relating to the sale of lands, and to the whole of the seventeenth section, as to contracts, bargains, or agreements as to the sale of goods, wares, and merchandise, as therein named; they hold, that there must be a note or memorandum in writing, signed by the party to be charged, of the whole contract, independent of the mutuality, showing "all the essential elements of the contract," and, therefore, necessarily and of course, the consideration, without which neither "all the essential elements of the contract" appear in the writing, nor, in fact, any semblance of an executory contract, bargain, or agreement at all, but that which, on its very face, is simply *nudum pactum*.

4. And yet, although they continually hold, as we show, *ante*, fully, by the cases which we have exhaustively examined, that the consideration, as one of "all the essential elements of the contract," *must fully and accurately appear* or be stated in the writing; yet, in the very face of this, they affect in virtually all those cases to hold that the "consideration" need not appear in or be expressed by the writing, and that the well-decided English cases which hold that it must be shown by the writing, or by a fair inference from it, are wrongly decided.

5. That they have reached such an absolutely absurd position by confounding, in connection with the sales, contracts, bargains,

or agreements, of or relating to land in the fourth section, and to the goods, wares, and merchandise of the seventeenth section, the *consideration*, in such sales, contracts, bargains, or agreements, — which the statute requires to be evidenced by the writing, signed by the party to be charged, — with that entirely different entity, the *aggregatio mentium*, the *mutuality*, the assent to the sale, contract, bargain, or agreement, by the other party thereto, — which the statute does not require to be evidenced by the writing signed by the party whom it is sought to charge thereby, but can be shown by evidence *dehors* such writing.

6. The confounding by those courts, in reference to the sales, contracts, bargains, or agreements, last above named, of the *consideration*, which they, although affecting not to do so, really hold must be shown in and by the writing, with the *mutuality*, which they miscall the "consideration," which need not be so shown, but which "may be proved otherwise," shows the incorrectness of their decisions with respect to the clause in the fourth section relating to the promise of one to answer for the debt, default, or miscarriage of another, where they have not confounded the consideration with the mutuality; the consideration, for the special promise, contract, bargain, or agreement, as to that clause, being as much required to be shown in the writing, by the language of the fourth section, as in the case of the sale of land under that section, or by the language of the seventeenth section, as to contracts, bargains, or agreements for the sale of goods, wares, and merchandise.

7. The effect of the judicial confounding of the consideration with the mutuality, seems to have been, that it has been followed up, in some of the States, by the legislatures, as in Maine and Massachusetts, where it is provided that the consideration need not appear in the writing, with respect to such special promises, contracts, and agreements as those in the fourth section of the English statute, and, as in Michigan, where[1] such a provision is made applicable to all the contracts, agreements, or promises required, by their Statute of Frauds, to be evidenced by writing. The direct effect of this, if they intend "consideration" to mean *consideration*, would be, by the one section which provides that the "consideration" need not be expressed in the written "contract or agreement,"[2] to repeal the previous sections, which provide

[1] See Michigan Genl. Sts. of 1882, § 6189; old §§ 3187, 4703.

[2] They never seemed to have considered the impossibility of there being a "written *contract* or *agreement*" (in the ordinary sense of contract or agreement, not including gifts), in which no consideration is expressed. An executory contract or agreement, with only one side to it, would be rather difficult, surely, to define. Not only would it lack the essential ingredient of mutuality, but, without a consideration, it would be a mere *nudum pactum* — a naked, unsupported promise.

that the agreement, contract, or bargain, or some note or memorandum of the agreement, contract, or bargain, must be in writing, signed by the party to be charged therewith. But the courts, extending their confusion, as with their construction of the language of the English statute, in making consideration sometimes mean mutuality, and sometimes only consideration, properly; similarly construe the word "consideration" in their statutes, making it, as under their construction of the English act, mean, in the one case consideration, and in the others only mutuality.[1]

We think that, without even considering the effect of the English cases, the result of our examination of so many of the representative cases in this country, which hold, or affect to hold, that the statute, which requires that the contract, bargain, agreement, or some note or memorandum of the contract, bargain, or agreement, must appear in writing, signed by the party sought to be charged thereby, is satisfied by a note or memorandum in writing of merely one side of such contract, bargain, or agreement, is to show that those cases do not themselves sustain such an unsound position, and that, to the extent to which they really do hold this fallacious doctrine, those cases themselves show, examined as a whole, the utter untenability and unsoundness of that which they so hold, or affect to hold. But we shall examine a few of the cases in this country which sustain what we think is clearly the sound doctrine on the subject.

In a very early case in New York[2] (A. D. 1808), the question was expressly decided by the unanimous judgment of the court, as one that scarcely admitted of doubt. Van Ness, J., in delivering the judgment of the court, said: "I am clearly of opinion, that the consideration, as well as the promise, must be in writing. The statute provides that the party shall not be charged, unless the agreement upon which the action shall be brought be in writing. This means the whole agreement, of which the consideration forms an essential and material part. It is as necessary to the

[1] See the cases we have examined, *supra*, decided by the courts of Massachusetts and Maine, and see Jones *v.* Palmer, 1 Doug. (Mich.) 379; McMurtrie *v.* Bennette, Harr. Ch. (Mich.) 124, 126; Millard *v.* Millard, *Ib.* 373, 392; Bouvier *v.* Caldwell, 8 Mich. 463, 468, 469; Mowrey *v.* Vandling, 9 Mich. 39; Hall *v.* Soule, 11 Mich. 494, 497. In this last-named case it is said: "It has always been settled that the memorandum must show *the whole terms of the contract*, and that no resort can be had to parol evidence to add to them. Our statute does not require a contract of this kind to set forth its consideration, but makes no other change." How the "whole terms of the contract" can be set forth, and, at the same time, one half of them be omitted, covering all the one side of the contract, is not clear. See further, McClintock *v.* Laing, 22 Mich. 217; The Detroit, &c. R. R. Co. *v.* Forbes, 30 Mich. 165, 173 *et seq.*; Palmer *v.* The Marquette, &c. Rlg. Mill Co., 32 Mich. 274; Abell *v.* Munson, 18 Miss. 306; and other Michigan cases cited and examined, *ante*, p. 548, *et seq.*, n.

[2] Sears *v.* Brink, 3 Johns. 210.

prevention of fraud and perjury, that the consideration which leads to the promise should be in writing, as the promise itself. The word 'agreement' comprehends the consideration as well as the promise."

In Bogert *v.* Ogdens,[1] the question as to the want of mutuality in the written note or memorandum of the contract, to satisfy the statute, is not confounded, as it is in so many of the previous American cases we have examined, with the want of the consideration being shown by the writing. In this case it was not necessary to decide the question as to the mutuality not so appearing; but it was held by the court, Kent, C. J., delivering the opinion, that the meaning and substance of the statute is, and without which the beneficial end of it would be entirely defeated, that the memorandum must state *the contract* with reasonable certainty, so that the substance of it can be made to appear, and be understood from the writing itself, without having recourse to parol proof. So, in the New York Court of Appeals, it was held that, to constitute a contract, there must be parties, a subject-matter, and a consideration. The written memorandum demanded by the statute requires this in the writing subscribed by the party to be charged. The form of the writing is not regarded. If the writing expresses a contract, no matter how informally, the statute is satisfied. So, on the other hand, no matter how formal the writing may be, if it do not contain within itself a contract, it fails to satisfy the statute.[2]

In a case in the Supreme Court of the United States,[3] decided several years (A. D. 1799) before Wain *v.* Warlters [4] was decided in England, it was held, in an action against the defendant, on a special promise to pay the debt of another, that the undertaking, to save it from the Statute of Frauds, must be in writing, and "*wholly*" so,[5] and that the papers relied upon "as the written agreement" cannot be added to, or varied, by parol testimony, nor can they be so far explained as to affect their import with regard to the supposed undertaking.[6]

[1] 3 Johns. 399, 419.

[2] Calkins *v.* Falk, 38 How. Pr. 62.

[3] Clarke *v.* Russel, 3 Dall. 415, 424.

[4] 5 East, 10.

[5] The word "*wholly*" is italicized by the court.

[6] In Violett *v.* Patton, 5 Cranch, 142, it was held that as in Virginia the statute provided that an action could not be brought unless the "promise or agreement," or some note or memorandum thereof were in writing, that the same reasoning would not apply to the Virginia statute, as it would to 29 Car. 2, c. 3, § 4. But as the Virginia act (see Va. Rev. Code of 1803, c. 10, § 1) enacted that no action should be brought upon a "special promise," it is questionable if there would be any distinction in the construction of the two statutes. But in Violett *v.* Patton, 5 Cranch, 142, it was held that the writing did express a consideration. In this case, Marshall, C. J., asked counsel: "Do you mean to state that if A. writes a letter to B., stating that if B. will let C. have goods, A. will pay for them if C. does not, A. would not be be bound?" to which counsel properly replied: "Probably in

And in Barry *v.* Coombe,[1] under the Statute of Frauds of Maryland, which requires in the case of a sale of land written evidence of the contract, it was held by the United States Supreme Court that the statute requires a note or memorandum in writing of *the agreement;* and that, although the form is not regarded, nor the place of signature, yet that the writing must furnish evidence of *a complete and practicable agreement.* In this case the note or memorandum in writing, which was signed by the party sought to be charged, showed the consideration; but, as it was not signed by the other party to the contract (whose name, however, sufficiently appeared in it to show who was the other party to the contract), the mutuality did not appear by the writing. The following words were at the foot of an account between the plaintiff and defendant, signed by the defendant: "By my purchase of your one half E. B. wharf and premises, this day, as agreed on between us, $7,578.63." The court, in holding that the statute was satisfied, said: "Brief as it is, this memorandum contains a condensed summary of *all the essentials to a complete contract.* By the use of the present tense it speaks of a thing final and concluded. By reference to the date at the head of the account, the use of the words, 'this day,' gives a date to the transaction. By the use of the pronouns 'your' and 'us,' the parties are distinctly introduced. *By carrying out the price the consideration is expressed with absolute precision,*[2] and by deducting it from the sum due by Barry, the receipt of the consideration is acknowledged; nor is there a single ingredient of *a complete con-*

that case it would be considered that the letter did state the consideration." The consideration would there be stated, but not the mutuality.

In DeWolf *v.* Rabaud, 1 Pet. 476, Judge Story, in delivering the judgment of the United States Supreme Court, said: "The case of Wain *v.* Warlters, 5 East, 10, was the first case which settled the point [but see, *per* Wilmot, J. (A. D. 1765), in Pillans *v.* Mierop, 3 Burr. 1663, 1666, who laid down the same principle which was subsequently established by Wain *v.* Warlters, 5 East, 10, that in the case of the special promise of one to pay the debt of another, the note or memorandum in writing must show the consideration as well as the promise, to satisfy the statute], that it was necessary, to escape from the statute of frauds, that the agreement should contain the consideration for the promise, as well as the promise itself. If it contained it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms, or by necessary implication. That case has from its origin encountered many difficulties, and been matter of serious observation both at the bar and on the bench, in England and America. After many doubts, it seems at last, in England, by the recent decisions of Saunders *v.* Wakefield, 4 B. & Ald. 595, and Jenkins *v.* Reynolds, 3 Br. & B. 14, to have settled down into an approved authority." However, in DeWolf *v.* Rabaud, 1 Pet. 476, the court did not decide the question, considering themselves bound by the holding of the courts of New York, which have followed and approved the English decisions.

[1] 1 Pet. 640.

[2] This shows the incorrectness of the view of Browne on the Statute of Frauds, §§ 381, 381*a*, commented on by us, *supra*, where, rather confounding, as is so often done, the mutuality with the consideration, the opinion is expressed that setting forth the price in the writing, of the land or goods purchased, is something different from showing the consideration.

tract deficient, unless the description of the property contracted for be insufficient." And on this point it was decided that extrinsic evidence was admissible to show what was meant by the "E. B. wharf and premises." [1]

The same doctrine is laid down by Miller, J., in the much later case of Grafton *v.* Cummings,[2] where he says, in delivering the unanimous judgment of the United States Supreme Court: "The statute not only requires that the agreement on which the action is brought, or some memorandum thereof, shall be signed by the party to be charged, but that the agreement or memorandum shall be in writing. In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. *There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it.*" That is, in order to satisfy the requirements of the statute, *the whole contract*, bargain, or agreement, or a note or memorandum thereof, that is, of the *whole contract*, bargain, or agreement, must appear in the writing, or by fair inference from it; and, therefore, of course, the consideration — that which the one is to get for that which he is to give — must so appear, or there is no contract shown.[3]

[1] See as to the admissibility of parol evidence to explain technical expressions, or to connect papers referred to in the note in writing, Boydell *v.* Drummond, 11 East, 142; Coles *v.* Trecothick, 9 Ves. 250; Clunan *v.* Cooke, 1 Sch. & Lef. 22; Dobell *v.* Hutchinson, 3 A. & E. 355; Johnson *v.* Miller, 35 N. J. Law, 344; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273; First Baptist Church *v.* Bigelow, 16 Wend. 28; O'Donnell *v.* Leeman, 43 Me. 158; Knox *v.* King, 36 Ala. 367; Sievewright *v.* Archibald, 17 Q. B. 103; McLean *v.* Nicoll, 7 Jur. N. S. 999; Lerned *v.* Wannemacher, 9 Allen, 412.

[2] 99 U. S. 100, 106.

[3] The case of Grafton *v.* Cummings, 99 U. S. 100, was one under the statute of New Hampshire, where the clause relating to the sale of land is in the same language as in 29 Car. 2 c. 3, § 4. The court recognized and approved, without question, the authority of the English decisions, as sustaining their view of the construction of the statute as above expressed. They say (at p. 109): "In the leading case of Wain *v.* Warlters, 5 East, 10, decided by Lord Ellenborough under the English statute, the same as that of New Hampshire on the point in question, that eminent judge said: 'The question is whether that word [agreement] is to be understood in a loose, incorrect sense, in which it may be sometimes used as synonymous to promise or understanding, or in its more correct sense of signifying a mutual contract on consideration between two or more parties.' He held the latter to be the true construction, and that *all its essential elements must appear in the memorandum, including the consideration*, which in that case was absent. This has been held to be the law in England ever since." And while the court do not make even the slightest reference to such cases as those in Massachusetts and Maine, which we have exhaustively examined *supra*, they expressly approve and follow the case of Williams *v.* Byrnes, 9 Jur. N. S. 363, decided by the privy council, where, in delivering the judgment of the judicial committee, Sir J. T. Coleridge says: "The words of the statute require a written note of a bargain or contract, the statute clearly making no distinction between those two words. [This shows the incorrectness of Smith, Parsons, &c., on this point.] This language cannot be satisfied *unless the exist-*

So, in Salmon Falls Manuf. Co. *v.* Goddard,[1] the United States Supreme Court held, under the section of the Massachusetts stat-

ence of contract appear evidenced in writing; and a bargain or contract cannot so appear unless the parties to it are specified, either nominally or by description or reference. It is true that the statute does not require the whole bargain in all its terms to be stated. It stipulates only for a note or memorandum of it, signed by the party to be charged; but it does, in effect, *require that the essentials, i. e., all those things without which it can be no bargain at all, shall be.* Upon this principle it was that the courts determined, under the 4th section, that the consideration of an agreement must appear on the face of the memorandum of a guarantee, or be matter of necessary implication from its language. It was obviously the intent of the statute to prevent, as far as it could conveniently, the mischief of being obliged to have recourse to oral evidence in regard to the transactions within it. But it would fail to accomplish its object in a most material particular, and in one in which its requirements might always be most easily satisfied, if it did not impose the necessity of stating the name of the seller as well as of the buyer; of the party by whom goods were to be supplied as well as of him to whom they were to be supplied, under the 17th section; or of the party to be guaranteed as well as of him who is to guarantee, under the 4th. Unless this be done, oral evidence must be had recourse to, and the risk incurred, that a party may be sued by one with whom he had never intended to have any transaction, — a matter of the greatest importance under many supposable circumstances." See also, Champion *v.* Plummer, 1 B. & P. N. R. 252; Wheeler *v.* Collier, 1 M. & M. 123; Shortrede *v.* Cheek, 1 A. & E. 57; Graham *v.* Musson, 5 Bing. N. C. 603; Allen *v.* Bennet, 3 Taunt. 169; Bateman *v.* Phillips, 15 East, 272; Laythoarp *v.* Bryant, 2 Bing. N. C. 735; Charlewood *v.* The Duke of Bedford, 1 Atk. 497; Egerton *v.* Mathews, 6 East, 307; Jenkins *v.* Reynolds, 3 Br. & B. 14; Bainbridge *v.* Wade, 16 Q. B. 89; Edwards *v.* Jevons, 8 C. B. 436; Bickmyr *v.* Darnell, 1 Salk. 27; Stadt *v.* Lill, 9 East, 348; Kennaway *v.* Treleaven, 5 M. & W. 498; Leroux *v.* Brown, 12 C. B. 801; Jones *v.* Williams, 7 M. & W. 493; Walter *v.* Dodgson, 3 C. & P. 162; Garrett *v.* Handley, 3 B. & Cr. 462; Williams *v.* Lake, 29 L. J. Q. B. 1; Galley *v.* Taylor, 2 C. & K. 551; Gaunt *v.* Hill, 1 Stark. 10. Twenty-five years before Wain *v.* Warlters, 5 East, 10, was decided, it was held in Preston *v.* Merceau, 2 W. Bl. 1249 (A. D. 1779), that parol evidence was inadmissible to add to the consideration in the written evidence of a contract within the statute, by proving an additional rent beyond that expressed in the written agreement for a lease; Blackstone, J., saying: "Courts should be very cautious in admitting any evidence to supply or explain written agreements. Else the statute of frauds would be eluded, and the same uncertainty introduced by suppletory or explanatory evidence, which that statute has suppressed in respect to the principal object. It never ought to be suffered so as to contradict or explain away an explicit agreement, for that is, in effect, to vary it."

In Kennaway *v.* Treleaven, 5 M. & W. 498, where the guarantee was in the following language: "I hereby guarantee to you the sum of £250, in case P. *should default* in his capacity of agent and traveller to you," it was held to sufficiently show the consideration; it being held to be perfectly clear from the words that the parties were contemplating a future default to be committed by P., in the capacity of agent and traveller; and that, consequently, it must have been their intention that he should be employed in that capacity at some future period. And see Newbury *v.* Armstrong, 6 Bing. 201, where the guarantee was in these terms: "I agree to be security to you for T. C. for whatever, while in your employ, *you may trust him with*, and in case of default to make the same good," and the guarantee was held good on the ground that the future employment of T. C. was a sufficient consideration, and that this sufficiently appeared on the face of the guarantee. But in Cole *v.* Dyer, 1 C. & J. 461, where the guarantee showed simply a promise to pay the debt and costs of another in a suit, provided the amount was not paid to a named promisee before a named date; the court held that there was no sufficient statement in the writing from which the consideration could be inferred. In Hawes *v.* Armstrong, 1 Bing. N. C. 761, Tindal, C. J., said: "There must be a well-grounded inference to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise." In Raikes *v.* Todd, 1 Per. & D. 438, the guarantee was: "I hereby undertake to *secure* to you the payment of any sums of money

[1] 14 How. 446, 454.

ute, which is substantially the same as section 17 of 29 Car. 2, c. 3, that the word "bargain" in the statute means *the terms upon which the respective parties contract;* and in the sale of goods the terms of the bargain must be specified in the note or memorandum, and stated with reasonable certainty, so that they can be understood from the writing itself, without having recourse to parol proof; for, "unless the essential terms of the sale [which means, of course, all the terms of the sale] can be ascertained from the writing itself, or by a reference contained in it to something else, the memorandum is not a compliance with the statute."[1]

you have advanced or may hereafter advance to D. & Co., on their account with you, commencing Nov. 1, 1831, not exceeding £2000;" and it was held that no consideration for the past advances was stated, and that the actual consideration was uncertain, as the word "secure" would imply that forbearance was the consideration, while it was open to be contended that the future advances were the consideration for guaranteeing the past advances. To satisfy the statute, the consideration must directly appear, or be reasonably inferred from the language used. But mere conjecture is not sufficient; there must be reasonable certainty. Very much the same uncertainty exists in *Ex parte* Minet, 14 Ves. 189, as in Raikes *v.* Todd, 1 Per. & D. 438, as to the sufficiency of the statement of the consideration. The question, however, went off on another point. See further, Mason *v.* Pritchard, 12 East, 227; Russell *v.* Mosely, 3 Br. & B. 211; Jenkins *v.* Reynolds, 3 Br. & B. 14; Wood *v.* Benson, 2 C. & J. 94; Hawes *v.* Armstrong, 1 Bing. N. C. 761; James *v.* Williams, 5 B. & Ad. 1109; Ryde *v.* Curtis, 8 D. & Ry. 62; Thomas *v.* Williams, 10 B. & C. 664; James *v.* Williams, 3 N. & M. 196; Cole *v.* Duffield, 7 J. B. Moore, 252; Bainbridge *v.* Wade, 16 Q. B. 89; Steele *v.* Hoe, 14 Q. B. 431; Lysaht *v.* Walker, 5 Bli. N. S. 1; Rogers *v.* Kneeland, 10 Wend. 218; 13 Wend. 114; Laing *v.* Lee, 1 Spencer, 337. Where the writing shows that there is a contract of some kind, but does not show what that contract is, the statute is not satisfied. Archer *v.* Baynes, 5 Ex. 625.

[1] This case in the Supreme Court of the United States, very correctly shows that there is no distinction between the 4th and 17th sections of the statute; but that *all the essential terms* of the agreement, contract, or bargain have to be shown by the writing as well under the 17th section as the 4th. The unfortunate intimation of Lord Ellenborough, however, in Egerton *v.* Mathews, 6 East, 307, that "agreement" under the 4th section meant something more than "bargain" under the 17th, although not acted upon either in that case itself or in any other English case succeeding it, has been stated, as though it were a fact, by counsel in a number of the English cases, as well as by highly respectable text-writers in England and America. A similar statement is also made in an early New York case, by the chancellor. Fisher *v.* Fields, 10 Johns. 495, 501. The only authority, however, for that was the *dictum* of Lord Ellenborough, in Egerton *v.* Mathews, 6 East, 307, which, subsequently, was not recognized by himself. Stadt *v.* Lill, 9 East, 348, compared with Wain *v.* Warlters, 5 East, 10, and Egerton *v.* Mathews, 6 East, 307. The language of the chancellor, in Fisher *v.* Field, 10 Johns. 495, 501, is: "The construction of the 4th section of the English statute has been given in the case of Wain *v.* Warlters, 5 East, 10, that the consideration is part of the agreement, and the whole agreement must be set forth. The doctrine of *nudum pactum* is there said not to be altered by the statute, for it did not mean to enforce any promise not valid before. The consideration might be illegal, or the promise might have been made on a condition precedent. The statute requires the agreement to be in writing, but here there is no consideration which must be part of the agreement, to support it. The solidity of this reasoning has since been admitted and enforced, and distinguished from the 17th section of the statute." Champion *v.* Plummer, 1 B. & P. N. R. 252, is also cited for this. But that case does not sustain any such distinction. The marginal note of the case would go to the extent even that, under the 17th section, the mutuality must also appear by the writing, it being there stated that, on a sale of goods, the note of the contract must be signed not only by the party to be charged, but by the other party as well. And, in the statement of facts, it is alleged that, in an action for the non-delivery of goods, Lord Mansfield non-

The principles of law are well and accurately stated by Southard, J., in an old case (A. D. 1819) in New Jersey, Bucklee *v.* Beardslee,[1] in the following propositions: —

1. A promise without a consideration is void, and the mere circ-

suited the purchasers because they had not also signed the writing. But the marginal note is unquestionably wrong; and we doubt if Lord Mansfield ever so decided as alleged, even at *nisi prius*. What he did decide, delivering the unanimous judgment of the full court, on discharging a rule to set aside the nonsuit, was, in effect, that as the note in writing must show what the whole contract or bargain is; a writing, not that was not signed by, but which does not show who are, the contracting parties, does not satisfy the statute.

The effect of Lord Mansfield's language in Champion *v.* Plummer, 1 B. & P. N. R. 252, 254 (which was decided in the Court of Common Pleas, A. D. 1805, virtually concurrently with the decision of Egerton *v.* Mathews, 6 East, 307, in the King's Bench), goes in effect to show that, under the 17th section, all the essential elements of the contract or bargain must appear by the writing, or otherwise the writing does not show what the *contract* or *bargain* is. The language of Lord Mansfield is: "How can that be said to be *a contract*, or *memorandum of a contract*, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiffs. There cannot be a contract without two parties; and it is customary in the course of business to state the name of the purchaser as well as of the seller in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain." The note in Champion *v.* Plummer, 1 B. & P. N. R. 252, did not state the names of purchasers at all; so there was nothing in the note to show to whom the goods were sold; and, therefore, although there was a note signed by the party whom it was sought to charge, it was not a note of the contract, as it did not show who the contracting parties were. It was, therefore, although showing the seller, the subject-matter, and the consideration, still deficient, as one of the essential elements of a contract, viz., the other party to it, was not shown by the writing. Although the actual holding in the case is so clear, yet not only is the marginal note of the case incorrect, but, in a foot note to the second edition of the report, it is said: "But it seems that a contract for sale of an interest in land need only be signed by the party sought to be charged thereby under the 4th section of the statute of frauds. *Vide* Seton *v.* Slade, 7 Ves. 275, and what is said of that case by Lord Ellenborough in Wain *v.* Warlters, 5 East, 16." The implication here is that, under the 17th section, the mutuality must also be shown by the writing, but that it need not be under the 4th; just making the very reverse mistake of that of Lord Ellenborough in his first impression in Egerton *v.* Mathews, 6 East, 307.

As illustrative of the ease with which blunders are perpetuated, we find in Merritt *v.* Clason, 12 Johns. 102, 104, it is alleged that "In Champion *v.* Plummer, 1 B. & P. N. R. 252, it was held that a memorandum signed by the seller only was not sufficient;" while, as we have shown, all that was held in that case was, not that the signing alone of the seller, who was the party whom it was sought to charge, was not sufficient to bind him, but that, though the writing was signed by him, yet, as it did not show who the other party to the contract was, not mentioning or referring to him at all, one of the essential elements of a contract was wanting in the writing; and, therefore, there was no note or memorandum in writing, signed by the party to be charged, of the *contract* or *bargain*. See, with reference to the mistake as to the holding in Champion *v.* Plummer, 1 B. & P. N. R. 252; *per* Lord Mansfield in Allen *v.* Bennet, 3 Taunt. 169; and in Clason *v.* Bailey, 14 Johns. 487, concurring with the view of it which we have taken.

It is noteworthy that, whatever Lord Eldon's impression may have been as to the necessity of the consideration appearing in the writing, under the clause in the 4th section as to the special promise to pay the debt of another, referred to by him in *Ex parte* Gardom, 15 Ves. 287, in A. D. 1800, and several years before either Wain *v.* Warlters, 5 East, 10, or Egerton *v.* Mathews, 6 East, 307, was decided, Lord Eldon himself, in Saunderson *v.* Jackson, 2 B. & P. 238, in effect held that, under the 17th section of the statute, a writing "which does not state the terms of the agreement," which means, of course, the whole terms of the agreement, does not satisfy the statute. The same

[1] 2 South. (N. J.) 570, 572.

cumstance that it is reduced to writing, if there be no consideration, does not make it valid.

doctrine was established, too, with respect to the sale of land, under the 4th section of the statute, long before Wain *v.* Warlters, 5 East, 10, was decided under another clause of that section. See Seagood *v.* Meale, Prec. in Ch. 560. These decisions were based on the general doctrine that the whole agreement must, under all the clauses of the 4th section, and equally so the whole bargain under the 17th section, be evidenced by the writing. See Clark *v.* Wright, 1 Atk. 12; Boydell *v.* Drummond, 11 East, 142; Tawney *v.* Crowther, 3 Bro. Ch. Cas. 318; Symondson *v.* Tweed, Prec. in Ch. 374; Gilb. Eq. Cas. 35; Bromley *v.* Jeffries, 2 Vern. 415; Underwood *v.* Hithcox, 1 Ves. Jr. 279. Abeel *v.* Radcliffe, 10 Johns. 297, 301, is in accord. So, in Clason *v.* Bailey, 14 Johns. 487, the court said: "Forms are not regarded, and the statute is satisfied *if the terms of the contract* are in writing, and the names of the contracting parties appear." In this case the question arose under the 17th section of the statute.

In Peltier *v.* Collins, 3 Wend. 459, 465, it was contended that, under the 15th section of the New York statute, which is similar to the English 17th section, all that was required was a *note* or memorandum of the bargain; that the consideration need not be stated, nor anything beyond the fact of a sale; and that the particulars of the agreement might be proved by parol, it being claimed that it differed from an agreement under the English 4th section, — the New York 11th, — as there the agreement has to be shown by the writing. See Weightman *v.* Caldwell, 4 Wheat. 91, n., for another instance of this fallacy. But the court, in Peltier *v.* Collins, 2 Wend. 459, 465, in deciding that a warranty of the quality of the goods as an essential element in a contract, under the New York 15th section, must appear in the writing to satisfy the statute, said: "If parol evidence were permitted to show terms and conditions in a contract, other than such as are specified in the memorandum, all the mischiefs would result from such a rule that would be the consequence of a total abolition of the statute. The object of the memorandum is not merely to prove that there was a bargain, *but to show what the bargain was, at least the extent and entirety of the consideration for the promise on which the suit is brought.*" It almost passes comprehension that courts of comparative respectability should have held *contra* to this virtually self-evident, simple proposition, for three quarters of a century, as in Massachusetts, Maine, etc. Yet such, however, has been the case. See *per* Buller, J., in Brodie *v.* St. Paul, 1 Ves. Jr. 326, 333 (A.D., 1791, thirteen years before Wain *v.* Warlters, 5 East, 10, which preceded Egerton *v.* Mathews, 6 East, 307, and Stadt *v.* Lill, 9 East, 348, was decided): "If the agreement is certain, and explained in writing, signed by the parties, that binds them; if not, and evidence is necessary to prove what the terms were, to admit it would effectually break in upon the statute, and introduce all the mischief, inconvenience, and uncertainty the statute was designed to prevent." See, also, First Baptist Church *v.* Bigelow, 16 Wend. 28, 31; Hicks *v.* Mintum, 19 Wend. 550, 552 (as to the note of the sale by an auctioneer, under the New York statute, 2 R. S. p. 136, § 4); Calkins *v.* Falk, 39 Barb. 620, 622, *et seq.*; 38 How. Pr. 62; Hagan *v.* Domestic Sewing Machine Co. 9 Hun, 73; Douglass *v.* Howland, 24 Wend. 35.

But a consideration implied or inferred from the terms of the instrument is as effectual as if expressly appearing on its face; it being a general principle applicable to all instruments or agreements, that whatever may be fairly implied from the terms or language of an instrument is in judgment of law contained in it. Rogers *v.* Kneeland, 10 Wend. 219, 252; 13 Wend. 114, 127; DeWolf *v.* Rabaud, 1 Pet. 476, 501. But, under the New York statute (2 R. S. p. 135, § 2, cl. 2), which provided that the consideration must be expressed in the writing, it was held that it could not be implied, inferred, or spelt out from the writing, but must expressly appear in it. Packer *v.* Wilson, 15 Wend. 343; Sackett *v.* Palmer, 25 Wend. 179, 183. See Church *v.* Brown, 21 N. Y. 315; Union Bank *v.* Coster's Exrs., 3 Comst. 203; Allen *v.* Jaquish, 21 Wend. 628. By act of 1863, c. 464, the words "expressing the consideration" were omitted from the New York act. It was held in the New York Superior Court, under this act, in Speyers *v.* Lambert, 37 How. Pr. 315, 323, that it was the intention of the legislature to enact that the writing need not only not *express* the consideration, but that the note or memorandum in writing was sufficient, though the consideration could not be "expressed, implied, or spelt out" from the writing, as it had been previously held that it might be. Packer *v.* Wilson, 15 Wend. 343. But Speyers *v.* Lambert, 37 How. Pr. 315, was expressly overruled by the Supreme Court

2. The design of the statute was not to prevent contracts, void for want of consideration, from being sustained in courts of jus-

of New York, in Castle *v.* Beardsley, 10 Hun, 343, 346, where it was decided that the effect of the act of 1863 was to restore the law as it was before the revision of 1830, and to remove the doubts which had arisen as to the construction of the act of 1830; the court saying: "The only inference as to the intention of the legislature in the amendment of 1863 which can be safely drawn from the act then passed, is, we think, that the legislature intended to restore the law to what it was settled to be before the omitted words, which had given rise to controversy and uncertainty, had been inserted. This is plainly what the legislature did, and to hold that it intended to simply restore the law to what it was before the omitted words were inserted. But to go further, and abrogate the necessity of having that part of the agreement relating to the consideration in writing, like the residue, we think is unwarranted by any sound and safe rule in the interpretation of statutes, and would approach the assumption of legislative power by the court." So the statute and law of New York are now, in effect, as under the 29 Car. 2, c. 3, and the statute of frauds of New York, before the revision of 1830. Hence, in Castle *v.* Beardsley, 10 Hun, 343, where there was a promise in writing, signed by the defendant, promising to pay the debt of another; but as no consideration was expressed in the writing, or could be fairly inferred from it, it was held that the promise was void; that, in the language of Talcott, J., delivering the unanimous judgment of the court, "It was a mere naked promise to answer for the debt of another, and manifestedly void by the statute of frauds, if that statute requires, as we hold it does, that the consideration, as well as the promise, should appear by agreement in writing."

It was, however, held, in the old and quite leading case of Leonard *v.* Vredenburgh, 8 Johns. 29, where goods were sold to one Johnson by the plaintiff, who took Johnson's promissory note therefor; the defendant, *as a part of the original transaction*, indorsing on the note, "I guaranty the above," which he signed; that, although this was a collateral undertaking on the part of the defendant to pay the debt of another, yet the consideration for the note was sufficient to sustain the guaranty, without its being definitely expressed in the writing. The case is so valuable on the subject, we quote from it at length. It was tried before Kent, C. J., and, at the trial, he nonsuited the plaintiff. But, on further consideration, the view of that able judge changed, and, in delivering the unanimous judgment of the Supreme Court of New York, he said: —

"There is no doubt that this was a collateral undertaking, within the purview of the statute of frauds; for Johnson's note is conclusive proof that credit was given to him, and that he was liable to the plaintiff. If the whole credit is not given to the person who comes in to answer for another, his undertaking is collateral. I have not been altogether satisfied with the decisions referred to, but it appears to me that the present motion can be determined in favor of the plaintiff without disturbing them; and, perhaps, the examination which I may give to the cases upon the statute of frauds may help to illustrate the reasonableness of those decisions.

"If we admit the origin of the contract to be such as the plaintiff offered to show, there was no necessity for, nor was there, in fact, any consideration passing directly between the plaintiff and defendant; and, of course, none was to be proved. It was all one original and entire transaction, and the sale and delivery of the goods to Johnson supported the promise of the defendant, as well as the promise of Johnson. If the contract between Johnson and the plaintiff had been executed and perfectly past, before the defendant was applied to, so that his promise could not connect itself with the original communication, then the case would have been very different, and the undertaking of the defendant would have required a distinct consideration. A mere naked promise to pay the already existing debt of another, without any consideration, is void. But in the present case, the promise was made at the time of the original negotiation between the plaintiff and Johnson. It was incorporated with that contract, and became an essential branch of it. The whole was one single bargain, and the want of consideration, as between the plaintiff and defendant, cannot be alleged. If there was a consideration for the entire agreement (and Johnson's note, purporting to be given for value received, was evidence of it), that consideration was the aliment for the defendant's promise. This is the amount of the doctrine in Kirby *v.* Coles, Cro. Eliz. 137; and it is alluded to in Tomlinson *v.* Gill, Amb. 330, and Williams *v.* Leper, 3 Burr. 1886; and to this extent I can understand the observation of Lord Eldon (14 Ves. 190), when he observes, that 'the undertaking of one man for the debt

tice. Such contracts were not sustained before the statute was made, and it was more than useless to say that they should not be enforced.

of another does not require a consideration moving between them.' In Wain *v.* Warlters, 5 East, 10, the promise of the defendant was not made at the time, nor did it form a part of the original contract between the creditor and the third person. It was made long after the debt had been created, and, therefore, in that case, the promise required something more to support it than the mere fact of the liability of the person for whom the defendant assumed. That fact alone would have left the promise a nude pact. It required, at least, the consideration of forbearance, or some other consideration, arising out of, and founded upon, the original liability. The same remark applies to the case of Sears *v.* Brink, 3 Johns. 210. But, if a promise to pay the debt of another be founded on a new and distinct consideration, independent of the debt, and one moving between the parties to the new promise, it is not a case within the statute. It is considered, in the light of an original promise. The cases of Tomlinson *v.* Gill, Amb. 330, and Williams *v.* Leper, 3 Burr. 1886, proceed upon this distinction, and the point is too clearly settled to be questioned.

"There are, then, three distinct classes of cases on this subject, which require to be discriminated: 1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration than that moving between the creditor and original debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. The cases of Fish *v.* Hutchinson, 2 Wils. 94; of Charter *v.* Beckett, 7 T. R. 201, and of Wain *v.* Warlters, 5 East, 10, are samples of this class of cases. 3. A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The first two classes of cases are within the statute of frauds, but the last is not, 1 Saund. 211, n. 2. The case before us belongs to the first class; and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary, by parol proof; and the decision in Wain *v.* Warlters, 5 East, 10, did not stand in the way. The whole agreement between the plaintiff and defendant consisted in the promise to guaranty the debt of Johnson. To say that the promise is void, for want of disclosing a consideration, is assuming what the plaintiff offered to show ought not to be assumed, for there was no distinct consideration passing between the plaintiff and the defendant. *Johnson's note given for value received, and, of course, importing a consideration on its face, was all the consideration requisite to be shown.* The paper disclosed that the defendant guarantied this debt of Johnson; and if it was all one transaction, the value received was evidence of a consideration embracing both the promises. The writing imported, upon the face of it, one original and entire transaction; for a guaranty of a contract implies, *ex vi termini*, that it was a concurrent act, and part of the original agreement. In Stadt *v.* Lill, 9 East, 348, the defendant gave a guaranty in this form: 'I guaranty the payment of any goods which Stadt delivers to Nichols;' and the King's Bench held that 'the stipulated delivery of the goods to Nichols was a consideration appearing on the face of the writing, and when the delivery took place the consideration attached.' The writing in the present case was of equivalent import and effect. Instead of saying that he guarantied the payment of goods delivered to Johnson, the defendant guarantied the payment of the value received by Johnson. Upon the whole, we think that the plaintiff was entitled to recover, upon production and proof of the writing. But if there was any doubt, upon the face of the paper, whether the promise of Johnson and that of the defendant were or were not concurrent, and one and the same communication, the parol proof was admissible to show that fact."

The effect of Leonard *v.* Vrenderburgh, 8 Johns. 29, really is, that when a promise or guaranty to pay the debt of another, within the statute of frauds, is part of an original contract, and the promise or guaranty is signed by the party to be charged, and the consideration is expressed, or is fairly to be implied in the writing connected with which the written promise or

3. The design of the statute was to prevent the enforcing of contracts, not void, but legal in their nature, for the payment of

guaranty is given, the case is taken out of the statute. But if the guaranty or promise is subsequent to the original contract, and not a part of it, so that the original consideration does not attach to the guaranty or promise, there the new consideration, in order to show the agreement, must appear directly in, or by necessary inference from, the written statement of the guaranty or promise itself. Thus stated, the case is in harmony with other well-decided cases on the statute.

With reference to the third class of cases of which Kent, C. J., speaks in the above, which do not come within the statute as the promise to pay the debt of another, although, in fact, the promise incidentally is to pay such a debt, — and of which class such cases as Williams *v.* Leper, 3 Burr. 1886; Meredith *v.* Short, Salk. 25; and Castling *v.* Aubert, 2 East, 324, are illustrative cases, — the principle is, that where there is a new consideration of benefit or harm *moving between the newly contracting parties*, there the case is not within the statute, as the contract is a complete contract between the promisor and promisee, supported by a sufficient consideration moving between them. Thus, the promise to pay the debt of a third person in consideration of forbearance to sue, or giving time, to the debtor, is a perfectly good contract at common law, supported by a sufficient consideration; yet, as the consideration moves between the promisee and the debtor, it is within the statute, and the promise and the consideration must both appear by the writing, or the promisor is not bound, — as in Wain *v.* Warlters, 5 East, 10; in Stadt *v.* Lill, 9 East, 348; and in many other cases. But where A. promises B. to pay C.'s debt, if B. will surrender to A., C.'s promissory note, or relinquish to him property of C. on which A. has distrained or holds a lien, there the consideration moves between the promisor and the promisee, — as in Williams *v.* Leper, 3 Burr. 1886, and the other cases, — and the contract is an original contract between A. and B., supported by a consideration moving between them, and the promise is not within the statute. In Jones *v.* Palmer, 1 Doug. (Mich.) 379, 382, the court, mistaking the law, laid down the principle incorrectly thus: "When the promise is made upon some new consideration sufficient in law to support it, though it be in effect to answer for another person, it is considered an original promise, and not within the statute of frauds." As we have pointed out above, there may be a new consideration sufficient in law to support the promise, and yet the promise be merely collateral. The promise is original when the consideration therefor moves between the newly contracting parties, — the promisor and promisee, — and not between the old contracting parties, — the creditor and the original debtor. When the consideration moves between the creditor and the original debtor, the promise is collateral, and within the statute.

And, on the other hand, it is clear that, to bring the promise to answer for the debt, default, or miscarriage of another, within the statute, there necessarily, by the very language of the act, must be *that other* for whose debt, default, or miscarriage, the promise is made. As if one promise to pay for work to be done, the benefit of which is to be derived by another, it is an original, and not a collateral, promise, on the part of the promisor, where no other than himself is liable for the work. The contract is between him and the promisee alone; and, therefore, is not within the statute at all, as there is no debt, default, or miscarriage of any other person than himself; and the contract, therefore, remains, as at common law, unaffected by the statute. This point is well illustrated by the very clear case of Mountstephen *v.* Lakeman, L. R. 5 Q. B. 613. There the plaintiff was employed to construct a main sewer by a local board of health, of which the defendant was chairman. When the sewer was nearly completed, the board gave notice to the occupiers of the adjoining houses to connect their drainage within twenty-one days, or the board would do the work at their expense. Before the twenty-one days had elapsed, the plaintiff and the defendant met. The defendant inquired, "What objection have you to make these connections?" The plaintiff said, "I have no objection to do the work, if you or the local board will give the order." The defendant replied, "You go on and do the work, and I will see you paid." The plaintiff accordingly did the work under the superintendence of the surveyor of the local board, and sent in the account to the board, debiting them with the amount. The board refused payment, on the ground that they had not authorized the order. And after more than two years, the amount being still unpaid, the plaintiff made a claim against the defendant, and brought an action against him. It was held by the Court of Queen's Bench that, coupling the expressions used with

another's debt, unless *the whole contract* was in writing. The attempt to enforce such contracts gave rise to perjury, as was suppthe position and conduct of the parties, the defendant's engagement did not amount to an undertaking to be primarily liable for the work, but only to a promise that, if the plaintiff would do the work on the credit of the board, the defendant would pay if the board would not; and that this was a promise to be answerable for the debt of another person within section four of the statute, although, in fact, the board never became indebted; and that the promise, not being in writing, could not be enforced. This holding would have established the rather monstrous proposition that a promise to be answerable for the debt, default, or miscarriage of another person is within section four of the statute, although that other person never becomes legally indebted to the promisee; that it is sufficient, to bring the promise within the statute that, at the time the promise is made, the promisor and promisee expect that a legal obligation towards the promisee will be incurred by a third person. The Court of Queen's Bench were unanimous in holding this doctrine. The following, with much less than his usual clear discernment, from the judgment of Blackburn, J., is the essence of the decision: "I think that the statute must be taken to apply to any contract of suretyship where there is an intention of guaranteeing the payment of a debt of another, and to require a writing wherever the contract, according to the intention of the parties, is a contract of suretyship. The enactment was aimed against what the legislature deemed the mischief of allowing a person to be fixed with liability for another by loose and idle talk; and the mischief, as it seems to me, would be just as great in a case where there is only a supposed or expected liability in the original debtor, as where there is an actual legal liability existing or afterwards contracted. The argument for the plaintiff amounts to saying, that if the original debtor shall turn out not liable, the surety shall become absolutely liable, although he has not done the only thing which the legislature says shall fix him with liability. The legislature has enacted that a contract of suretyship shall not depend on the slippery testimony of words; but to hold with the plaintiff would be to permit the very mischief intended to be remedied." The court seemed entirely oblivious of the fact that, outside of the promisor, there was no "original debtor" at all; and hence there was no one for whose debt, default, or miscarriage the promise was made; the promisor himself having been the only one who had incurred a debt, or had made a default or miscarriage in the matter.

As long ago as Harris *v.* Huntbach, 1 Burr. 371 (A. D. 1757), the opposite doctrine was established, where the promise to pay the debt of an infant was held to be an original undertaking of the promisor to pay the money; as the infant was not liable, and, therefore, it could not be a collateral undertaking. And see Birkmyr *v.* Darnall, 2 Ld. Raym. 1085, and Read *v.* Nash, 1 Wils. 305, in accord. So in Hargreaves *v.* Parsons, 13 M. & W. 561, 570, Parke, B., in delivering the judgment of the court, said: "The statute applies only to promises made to the persons *to whom another is already, or is to become, answerable.* It must be a promise to be answerable for a debt, or a default in some duty by that other person *towards the promisee.* This was decided, and no doubt rightly, by the Court of Queen's Bench in Eastwood *v.* Kenyon, 11 A. & E. 438; and in Thomas *v.* Cook, 8 B. & C. 728." See also, Goodman *v.* Chase, 1 B. & Ald. 297; Kirkham *v.* Marter, 2 B. & Ald. 613; Conturier *v.* Hastie, 8 Ex. 40; Cripps *v.* Hartnoll, 4 B. & S. 414; Green *v.* Cresswell, 10 A. & E. 453. The decision of the Court of Queen's Bench in the case of Mountstephen *v.* Lakeman, L. R. 5 Q. B. 613, was reversed by the Court of Exchequer Chamber, L. R. 7 Q. B. 196; the reversal being affirmed by the House of Lords. L. R. 7 H. L. 17. Lord Selborne, in his judgment in the House of Lords, in refutation of the judgment in the Court of Queen's Bench, thus conclusively dealt with the case; laying down clearly the following undoubtedly sound principles: "There are some observations in the opinions of the learned judges in the Court of Queen's Bench which certainly do look at first sight as if some of those learned judges thought that there might be a valid contract of suretyship, or a secondary liability upon the principle of a guarantee for the debt of some one else, to which the law relative to that description of contracts would apply, although there might be in truth no principal debtor. If that was the view of the learned judges, with all respect to them, I must confess myself unable to follow it. There can be no suretyship unless there be a principal debtor, who, of course, may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time; but until there is a principal debtor there can be no suretyship. Nor can a man guar-

posed. Now, the proof of the consideration was quite as likely to induce perjury as the proof of the terms of the contract. It

antee anybody else's debt unless there is a debt of some other person to be guaranteed. The tendency, therefore, of any view of this contract which would place it in the position of a guarantee for a future liability to be undertaken by the local board, would be absolutely to defeat the whole purpose of the communication, which was to remove a difficulty then pressing upon the mind of the contractor, as to whether or not he had sufficient authority from any one to go on with the work; and the answer was given in terms *de præsenti* for the express purpose of inducing him at once to go on."

The case of De Wolf *v.* Rabaud, 1 Peters, 476, in the Supreme Court of the United States, involves some very nice questions with reference to the point we have been considering. A letter was written by a third person, George De Wolf, to the defendant, James De Wolf (plaintiff in error), as follows: "You will please ship for my account, on board such vessel as I shall direct, 500 boxes white Havana sugar, consigned to R. & Co." (the plaintiffs; defendants in error). This was signed by George De Wolf, and assented to by the defendant, who wrote on the letter: "Agreed to, James De Wolf." The plaintiffs, R. & Co., in consideration for this undertaking, agreed to allow George De Wolf to draw on them for 100,000 francs. The sugar not having been shipped, R. & Co. brought an action against James De Wolf for damages for the non-shipment. Three questions, among others involved in the case, were, whether R. & Co. could sue on such a contract; whether their promise was to answer for the debt, etc., of another; and whether the consideration sufficiently appeared in writing. The court below held for the plaintiff on these points; and their holding was sustained by the Supreme Court on error. As the points involved in the case are extremely nice, we quote quite fully from the judgment of the court, delivered by Story, J., who says: "The great question upon the merits arises upon that part of the charge which relates to the agreement contained in the letter from George De Wolf to the defendant, and the accompanying assent of the latter, with reference to the statute of frauds. . . . Upon this part of the case, the charge was as follows: 'It is said that this letter, under the statute of frauds, does not purport on its face to contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection, I think, cannot be sustained. The first question to be settled, and which is matter of fact for your determination, is whether the arrangement between R. & Co., as to the authority to draw on the house in Marseilles, on the shipment and consignment of five hundred boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction.' The judge then proceeded to sum up the evidence on this point, and added: 'The consideration for this undertaking was the authority given by R. & Co. to George De Wolf, to draw on the plaintiffs for one hundred thousand francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is, whether it can be supplied by parol evidence; and I think it may if the undertaking of the defendant was entered into at the same time with that between R. & Co. and George De Wolf, so as to form one entire transaction. The evidence does not in any manner contradict the written agreement, and is perfectly consistent with it, as, between the plaintiffs and George De Wolf, the consideration might be clearly supplied by parol proof; and if the undertaking of the defendant was at the same time, it required no consideration from the plaintiffs to him. The consideration to George De Wolf was sufficient to uphold and support the contract of the defendant.' And he finally stated, if he was mistaken in this view of the evidence, 'and the jury should be of opinion that the contract between R. & Co. and George De Wolf was completed and unconnected with the engagement of the defendant before he undertook to make the shipment and consignment, then the evidence was not sufficient to maintain the present action. It will then be a collateral undertaking made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract.' The question, then, so far as it was a question of fact, whether the defendant did enter into the asserted agreement with the plaintiffs, and whether it was a part of the original arrangement with George De Wolf, and upon the original consideration moving from the plaintiffs, was before the jury, and they have found in the affirmative. The question of law remains, whether this was a case within the statute of frauds, so as to prevent parol evidence from being admissible to charge the defendant. The statute of frauds of New York is a transcript on this subject of the stat-

is reasonable to suppose the one would be guarded against as much as the other.

ute of 29th of Charles II. c. 3. It declares 'that no action shall be brought to charge a defendant on a special promise for the debt, default, or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party, or by any one by him authorized.' The terms 'collateral' or 'original' promise, do not occur in the statute, and have been introduced by courts of law to explain its objects and expound its true interpretation. Whether by the true intent of the statute it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration moving at the same time between the parties; or whether it was confined to cases where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination, at least in those States where the English authorities have been fully recognized and adopted in practice. If A. agree to advance B. a sum of money, for which B. is to be answerable, but at the same time it is expressed upon the undertaking that C. will do some act for the security of A., and enter into an agreement with A. for that purpose, it would scarcely seem a case of a mere collateral undertaking, but rather, if one might use the phrase, a trilateral contract. The contract of B. to repay the money is not coincident with, nor the same contract with C. to do the act. Each is an original promise, though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A., not solely upon the promise of B. or C., but upon the promise of both, *diverso intuitu*, and each becomes liable to A., not upon a joint, but a several original undertaking. Each is a direct, original promise, founded upon the same consideration. The credit is not given solely to either, but to both; not as joint contractors on the same contract, but as separate contractors upon coexisting contracts forming parts of the same general transaction. Of that very nature is the contract now before the court; and if the intention of all the parties was that the letter of Nov. 15 should be delivered to R. & Co. as evidence of the original agreement between all the parties, and indeed as part execution of it, to bind the defendant not merely to George DeWolf, but to the plaintiffs (and so it has been established by the verdict), then it is not very easy to distinguish the case from that which was put.

"But, assuming that the true construction of the statute of frauds is, as the authorities seem to support, and that such a promise would be within its purview, it remains to consider whether the arguments at the bar do establish any error in the opinion of the Circuit Court. In the first place, there is no repugnance between the terms of that letter and the parol evidence introduced. The object of the latter was to establish the fact that there was a sufficient consideration for the agreement, and what that consideration was, and, also, the circumstances under which it was written, as explanatory of its nature and objects. Its terms do not necessarily import that it was an agreement exclusively between George De Wolf and the defendant. If the paper was so drawn up and executed by the assent of all the parties, for the purpose of being delivered to R. & Co. as a voucher and evidence to them of an absolute agreement by the defendant to make the shipment, and so was, in fact, understood by all the parties at the time, there is nothing in its terms inconsistent with such an interpretation. The defendant agrees to the shipment. But with whom? It is said with George De Wolf alone; but that does not necessarily follow, because it is not an instrument in its terms *inter partes*. If the parties intended that it should express the joint assent of George De Wolf and the defendant to the shipment, and it was deliverable to R. &. Co. accordingly, as evidence of their joint assent that it should be made upon the terms and in the manner stated in it, there is nothing which contradicts its proper purport; and it is then precisely what the parties require it to be. It was for the jury to say whether the evidence disclosed that as the true object of it, and to give it effect accordingly, as proof of an agreement in support of the declaration. The case of Sargent *v.* Morris, 13 B. & Ald. 277, furnishes no uninstructive analogy for its admission. In the next place, was the parol evidence inadmissible to supply the defect of the written instrument as to the consideration and *res gestæ* between the parties? The case of Wain *v.* Warlters, 5 East, 10, was the first case which settled the point, that it was necessary, to escape from the statute of frauds, that the agreement should contain the considera-

4. If the design was to prevent the enforcing of a legal contract to pay another's debt, *i.e.*, a contract with sufficient consideration, and if the statute requires that contract to be in writing, it means that the whole contract should be in writing, and not such part only as is in its very nature illegal and void without the rest. The consideration of the promise, as well as the promise itself, ought, therefore, to be in writing.

5. The terms of the statute support this conclusion: "Unless the *agreement*, or some note or memorandum *thereof*, be in writing." Now, what is an *agreement?* A consideration is always contained in the legal idea of an agreement, and writers as well as courts always so consider it.[1]

tion for the promise as well as the promise itself. If it contained it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms or by necessary implication. That case has, from its origin, encountered many difficulties, and been matter of serious observation, both at the bar and on the bench, in England and America. After many doubts, it seems at last in England, by the recent decisions of Saunders *v.* Wakefield, 4 B. & Ald. 595, and Jenkins *v.* Reynolds, 3 Brod. & Bing. 14, to have settled down into an approved authority. It has not, however, received a uniform recognition in America, although in several of the States, and particularly in New York, it has, to a limited extent, been adopted into its jurisprudence as a sound construction of the statute. On the other hand, there is a very elaborate opinion of the Supreme Court of Massachusetts, in Packard *v.* Richardson, 17 Mass. 122, where its authority was directly overruled. What might be our own view of the question, unaffected by any local decision, it is unnecessary to suggest; because the decisions in New York upon the construction of its own statute, and the extent of the rules deduced from it, furnish, in the present case, a clear guide for this court. In the case of Leonard *v.* Vredenburgh, 8 Johns. 29, Mr. Chief Justice Kent, in delivering the opinion of the court, adverting to the fact that that case was one of a guarantee or promise collateral to the principal contract, but made at the same time, and becoming an essential ground of the credit given to the principal or direct debtor, added, 'and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary, by parol proof; and the decision of Wain *v.* Warlters did not stand in the way.' One of the points in that case was, whether the parol proof of the consideration was not improperly rejected at the trial; and the decision of the court was that it ought to have been admitted. It is not, therefore, as was suggested at the argument, a mere *obiter dictum*, uncalled for by the case. It was one, though not the only one, of the points in judgment before the court. The same doctrine has been subsequently recognized by the same court in Bailey *v.* Freeman, 11 Johns. 221, and in Nelson *v.* Dubois, 13 Johns. 175. It does not seem necessary to pursue this subject further, because here is a clear authority justifying the admission of the parol evidence upon the principle of the local jurisprudence. It seems to us a reasonable doctrine, founded in good sense and convenience, and tending rather to suppress than encourage fraud. But, whether so or not, it sustains the opinion of the Circuit Court in a manner entirely free from exception."

[1] Pillans *v.* Mierop, 3 Burr. 1670; Plow. 308 *b*; Dyer, 336 *b*; 2 Bl. Com. 446. Southard, J., after stating the above formal propositions, added: "If, then, this agreement had stated the forbearance or delay to prosecute, which is stated in the demand, it would have set forth a valid consideration, and been sufficient under the statute of frauds. As it has not set forth that, or any other consideration, I think it is insufficient." The above propositions, stated in the text, are in accord with the mass of authority of the courts of this country, manifested by either, in effect, a direct affirmation of the doctrines which these propositions clearly, and, without a particle of doubt, we think, correctly propound; or else, as in Massachusetts and Maine, while affecting to hold that the consideration need not be expressed in the writing, really holding, with respect to contracts coming within the purview of the statute, that the whole contract, or "all its essential elements,"

The conclusion, we think, resulting from the very full examination we have made of the subject, is that the law is perfectly

must appear in the writing; or else, they confound the mutuality with the consideration, or incorrectly fancy that Egerton *v.* Mathews, 6 East, 307, is decided *contra* to Wain *v.* Warlters, 5 East, 10, or establishes any different doctrine in respect to the necessity of the consideration appearing in the writing, or by fair inference from it, under the 17th section, than is established by such cases as Wain *v.* Warlters, 5 East, 10, and Stadt *v.* Lill, 9 East, 348, with respect to cases under the 4th section of the English statute. See Stephens *v.* Winn, 2 N. & McC. (S. C.) 372 n.; Sleeat *v.* Tavel, 3 McCord, 158; Miller *v.* Irvine, 1 Dev. & B. 103, 104, 106; Rice *v.* Carter, 11 Ired. 300; Green *v.* Thornton, 4 Jones (Law), 330; Laing *v.* Lee, Spenc. (N. J.) 337; Reynolds *v.* Carpenter, 3 Chand. (Wis.) 31; Taylor *v.* Pratt, 3 Wis. 594, 609; Wyeman *v.* Goodrich, 26 Wis. 21; Doty *v.* Wilder, 15 Ill. 407; McConnell *v.* Brillhart, 17 Ill. 354, 361, and the numerous cases there cited by the court, to the effect that "the writings, notes, or memoranda must contain on their face, or by reference to others, that is traceable, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the thing, interest, or property, as will be capable of identification and separation from other of like kind, together with the terms, conditions, and price to be paid, *or other consideration* to be given." Patmor *v.* Haggard, 78 Ill. 607, 611; Gregory *v.* Logan, 7 Blackf. (Ind.) 112: Noakes *v.* Morey, 30 Ind. 103, 110; Ridgway *v.* Ingram, 50 Ind. 145, 146, 148; Norris *v.* Blair, 39 Ind. 90, 94, and cases there cited; Neelson *v.* Sanborne, 2 N. H. 413; Underwood *v.* Campbell, 14 N. H. 393; Henderson *v.* Johnson, 6 Ga. 390; Hargroves *v.* Cooke, 15 Ga. 321; Nichols *v.* Allen, 23 Minn. 542; Walker *v.* McDonald, 5 Minn. 455; Hutton *v.* Padgett, 26 Md. 228; Nabb *v.* Koontz, 17 Md. 283; Brooks *v.* Dent, 1 Md. Ch. 523; Edelen *v.* Gough, 5 Gill, 103; Sloan *v.* Wilson, 4 Har. & J. 322, 329; Wyman *v.* Gray, 7 Har. & J. 409, 416; Elliott *v.* Giese, 7 Har. & J. 457; Weldin *v.* Porter, 4 Houst. (Del.) 236; Blair *v.* Snodgrass, 1 Sneed (Tenn.), 1, 25; Parker's Heirs *v.* Bodley, 4 Bibb, 109; Ellis *v.* Deadman's Heirs, 4 Bibb, 466; Soles *v.* Hickman, 20 Pa. St. 180; McFarrow's Appeal, 11 Pa. St. 503; Burke *v.* Haley, 2 Gilm. 614.

It is said in Patchin *v.* Swift, 21 Vt. 292, 297, that it is the settled law in Vermont that it is not necessary under their statute of frauds — which, in effect, is a transcript of 29 Car. 2, c. 3 — that the consideration, which, they say is necessary to support any contract, "should appear *upon the face of the written contract itself.*" What kind of a "written *contract*" it would be, which, on its face, expresses no consideration (as they were dealing there with executory contracts), they did not seem to stop to consider. It is clear that what they designate a "contract" would be simply *nudum pactum.* And the very language they employ shows, even more clearly than the language of the statute itself, the necessity of the whole contract, bargain, or agreement, or a note or memorandum *thereof* (including, of course, one of "the essential parts" of it, without which there is no binding executory contract, the consideration), being set out in the writing, or appearing by reasonable inference therefrom. And there is more than a question as to whether "the law" ("the very reason of the thing; for that which is not reason is not law") on the question is as well settled in Vermont, that, under the statute, the consideration of the contract, bargain, or agreement need not appear by the writing, as the court in Patchin *v.* Swift, 21 Vt. 292, 297, assumed it to have been. An examination of the previous authorities in Vermont will show that, as in Massachusetts and Maine, they affected to hold that the consideration need not appear in the writing, or by necessary inference from it, — claiming to dissent from the well-established doctrine of Wain *v.* Warlters, 5 East, 10, and the other well-decided cases following it, — yet, with reference, at least, to some of the contracts, bargains, agreements, under the statute, they really held that "*all the essential elements*" of such bargains, contracts, agreements, including, of course, the whole of each side thereof, must appear in the writing. True, in Smith *v.* Ide, 3 Vt. 290, they did hold — Royce, J., delivering the judgment — that the consideration for the special promise to pay the debt of another need not appear "in the note or memorandum in writing of the *agreement.*" But it is obvious that (see p. 300) they confound mutuality with consideration, the former of which, as we have shown, *supra*, Mr. Roberts, in his work on "Frauds," correctly contended, could not logically be shown by the writing without the writing being signed by both parties to it, which the statute does not require. The consideration, as we have fully shown in the first portion of this Part, is neither the mutuality, with

clear and well settled, on principle and the overwhelming weight of authority, that, with reference to the contracts, bargains,

which it is so often confounded, nor what is sometimes called "the motives and inducements," or "the motives and considerations." It is, in a word, that which the one party to the contract gives, or is to give, for that which he receives or is to receive.

It was contended for the defendant, in Thomas *v.* Thomas, 2 Q. B. 851, relying on the definition by Plowden, in commenting on Sharington *v.* Straton, Plow. 309, that, by the civil law *nudum pactum* is defined thus: "*Nudum pactum est ubi nulla subest causa præter conventionem; sed ubi subest causa, fit obligatio, et parit actionem;*" that what is meant by the consideration for a promise is the motive, cause, or inducement for making it. But the court expressly held the reverse, Lord Denman, C. J., saying: "There is nothing in this case (*i. e.* for the defendant) but a great deal of ingenuity, and a little blindness to the actual terms of the instrument itself. There is nothing whatever to show that the ground rent was not payable to a superior landlord; and the stipulation for the payment of it is not a mere proviso, but an express agreement. . . . This is in terms an express agreement, and shows a sufficient legal consideration, quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr. Williams's (defendant's counsel) definition of consideration is too large; the word *causa* in the passage referred to means one *which confers what the law considers a benefit on the party.*" And Patteson, J.: "It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant; it would be confounding consideration with motive. *Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff.* It may be some benefit to the plaintiff, or some detriment to the defendant; but, at all events, it must be moving from the plaintiff." And see a commentary on the Code Civil, in "*Codes Français Expliqués,*" by Rogron, Paris, 1836, in his note on "*Sans cause.*"

And, notwithstanding the holding of the Vermont Court in Smith *v.* Ide, 3 Vt. 290, as stated (Royce, J., delivering the judgment of the court), it was held, in Ide & Smith *v.* Stanton, 15 Vt. 685, 691 (Royce, J., again delivering the unanimous judgment of the Vermont Supreme Court), that, under the Vermont statute, *the whole of the bargain,* including the price as "*an essential ingredient in the contract of sale,*" must appear in the written note or memorandum of the bargain, to satisfy the statute; and that it "must be real and fixed, or be susceptible of being ascertained in the mode prescribed by the contract, without further negotiation between the parties;" citing 2 Kent's Com. 477. Also adding: "This accords also with the rules of the civil law, that the price ought to be established, for there can be *no bargain without a price;*" that is, more properly, as Noy has it (Noy's Maxims, by Blythewood, A. D. 1821), a *quid pro quo,* for (*Ibid.*) "It is a general learning that there must be in every contract *quid pro quo,* viz., some valuable consideration between the parties to be paid or performed, either presently or at a day to come; for *ex nudo pacto non oritur actio.*" The following, from the judgment of the Vermont Court, shows, not only how they were confounding the consideration with mutuality, but that they were, in effect, following the well-decided case of Egerton *v.* Mathews, 6 East, 307, which in effect holds that if, under the statute, the note or memorandum in writing contain all the essential elements of the contract, bargain, or agreement, the writing is sufficient to satisfy the statute, although signed by only the party to be charged. "The defendant's letters," say the court, in their judgment in Ide & Smith *v.* Stanton, 15 Vt. at p. 691, "which are relied on as furnishing the requisite written evidence in this case, disclose the names of the parties, and the subject-matter of the purchase, but are silent as to the price agreed to be paid. [Which was, of course, the consideration for the goods purchased.] *This, it is insisted, was but the consideration of the bargain, which, according to Egerton* v. *Mathews, 6 East,* 306 [?], *need not appear in the writing* [?]. But in that case the price was distinctly stated in the writing, and the question was whether, as the contract could not have been enforced against the plaintiff for want of his signature to the memorandum, the defendant was bound by it, without some consideration, apparent upon the writing, beyond his own admitted obligation. [What nonsense! His "own admitted obligation" is no consideration for that obligation itself. The consideration there was the cotton the defendants were to receive for the price — the 19*d. per* lb. — which they were to pay.] It was decided that *no such additional consideration* [then a consideration did appear!] was required to appear in writing. And this, it is believed, is the ex-

agreements, sales, under the 4th and 17th sections of 29 Car. 2, c. 3, and under other statutes in effect the same; such contracts, bargains, agreements, sales, or some note or memorandum *thereof*, must appear in the writing, or by reasonable inference therefrom; and that, under such statutes, there is no note or memorandum in writing of such sales, agreements, bargains, contracts, where any of the essential elements thereof are wanting. And as, without a consideration, there is no binding executory contract, where the consideration is not expressed in the writing or does not appear by reasonable inference therefrom, all the essential elements of a bargain or agreement are not stated, and the statute is not satisfied; this principle of law being clearly as applicable to this country as to England.

tent of all the decisions which have professed to follow out the doctrine of Egerton *v.* Mathews." The decisions which profess "to follow out the doctrine of Egerton *v.* Mathews," 6 East, 307, are all to the effect, if they do follow out that doctrine, as we have fully shown in this Part, that the whole contract, bargain, or agreement, in all its essential parts, outside of the mutuality, which can be shown *dehors* the writing, must, to satisfy the statute, be expressed in the writing, or appear by reasonable inference therefrom; and that neither in England or America is there one well-decided case which holds the contrary doctrine, notwithstanding those cases in a few of the States in this country which purport to have been otherwise decided.

An additional feature in the decision in Ide & Smith *v.* Stanton, 15 Vt. 685, 692, is that several English cases were cited by the Vermont Court to sustain their construction of the statute. Of these, Bromley *v.* Jeffries, 2 Vern. 415, did not arise under the statute, and merely holds that a covenant, without mutuality, would not be enforced. But, in Clark *v.* Wright, 1 Atk. 12 (A. D. 1737), Wain *v.* Warlters, 5 East, 10, not being decided until A. D. 1804, it was held that an agreement would not be enforced on a letter *unless it contained the full terms of the agreement*. So, in Blagden *v.* Bradbear, 12 Ves. 466, 471, it was held (and this was under the 4th section, in which the Vermont Court, in Smith *v.* Ide, 290, — and see Ide *v.* Stanton, 15 Vt. at p. 691, — treated the word "agreement" as *less* formal than "bargain" under the 17th) that the writing "must contain in itself, or by reference to something else must show, *what the agreement is;*" and, therefore, was insufficient, because it did not show the consideration, which, in that case, was the price of the land sold. And again, in the remaining case cited, Elmore *v.* Kingscote, 5 B. & C. 583, which was under the 17th section, the court held that "*There must be a note or memorandum in writing of the bargain;*" and, therefore, where anything, such as the consideration, — in this case the 200 guineas to be paid for the horse sold, — which "constitutes a material part of the bargain," is omitted from the writing, the statute, requiring a note or memorandum in writing of the bargain, is not satisfied. The more thoroughly and exhaustively the subject is examined, the more clearly and distinctly it is established, we think, that, whether under the 4th or 17th section of the statute, there must be a note or memorandum in writing of the whole contract, bargain, or agreement; and, therefore, where the writing fails to show any of the essential elements of the contract, bargain, or agreement, — *à fortiori*, the consideration, without which the undertaking is simply *nudum pactum*, — the statute is not satisfied. Such a conclusion seems so palpable, that it is "passing strange" that there should be any conflict of opinion on the subject.

BOOK IV.

PART IX.

THE ESSENTIAL REQUISITES OF THE MEMORANDUM.

By section seventeenth of the statute, the contract shall not be allowed to be good, unless some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. We have already seen, that, to comply with the requirements of this section, the note or memorandum in writing must show all the essential elements of the contract, outside of the mutuality, which latter can be shown by evidence *aliunde*. These essential elements are, the parties to the contract; the subject-matter of the contract; the consideration, which, as the other side of the contract, bargain, or agreement, covers all that goes to make up the terms and conditions of the sale, including the price, when that has been made an express element of the contract. And the memorandum must be signed by the parties to be charged, or their agents lawfully authorized.

Under the fifth section of 29 Car. 2, c. 3, it is enacted that devises of lands or tenements must be in writing, signed by the devisee, etc. It was very early decided, under this section, where the testator wrote his will with his own hand: "I, John Stanley, make this my last will and testament," without any further signature by him, that this was a sufficient signing to satisfy the statute; "for being written by himself, and his name in the will, it is a sufficient signing within the statute, which does not appoint where the will shall be signed, in the top, bottom, or margin, and therefore a signing in any part is sufficient."[1] As the language

[1] Lemayne *v.* Stanley, 3 Lev. 1; 33 Car. 2, A. D. 1680; Ellis *v.* Smith, 1 Ves. Jr. 11, 14. In Coles *v.* Trecothick, 9 Ves. 234, 249, Lord Eldon, in referring to the sufficiency of the language written by a testator himself of "I, A. B., do make this my will," etc., without any further signing to satisfy the statute, says: "But if it is sufficient in a will devising lands, it is very difficult to say upon what ground such a signature should not constitute an effectual agreement as to lands or goods; construing the very same words in one simultaneous act comprising the whole of the terms." (As regards wills in England, by 1 Vic. c. 26, § 39, the will has

in both the fourth and seventeenth sections is similar to that in the fifth, the decision is equally applicable to the three sections.[1]

In the old and leading case of Stokes *v.* Moore (A. D. 1786),[2] where it was held that the mere circumstance of the name of the party being written by himself in the body of a note or memorandum will not constitute a signature within the meaning of the Statute of Frauds, Baron Eyre thus laid down the law: "The signature is to have the effect of giving authority to the whole instrument, and if the name is inserted *so as to have that effect*, I do not think it signifies much, in what part of the instrument it is to be found. It is perhaps difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect; and then the name being generally found in a particular place by the common usage

to be signed at the foot or end thereof.) See Morison *v.* Turnour, 18 Ves. 175, 183, *per* Lord Eldon, where the language in the memorandum was in the third person: "Mr. Turnour has again seen Esher Hill Cottage, etc. . . . This induces him to make the present offer." This, under the authorities we cite, would clearly be a sufficient signing to satisfy the statute.

[1] In Lemayne *v.* Stanley, 3 Lev. 1, there is an *obiter dictum* that "the putting of his seal had of itself been a sufficient signing within the statute; for *signum* is no more than a mark, and sealing is a sufficient mark;" but Levinz, J., doubted of this upon the case in 1 Rolle Ab. 245; Arbitrement, B., pl., 25. In Smith *v.* Evans, 1 Wils. 313 (A. D. 1751), the *dictum* in Lemayne *v.* Stanley, 3 Lev. 1, was disapproved, the court holding that sealing is not a sufficient signing within the statute of frauds. In Grayson *v.* Atkinson, 2 Ves. Sen. 454, at p. 459, Lord Hardwicke says: "The statute requiring the will to be signed undoubtedly meant some evidence to arise from the handwriting; then how can it be said that putting a seal to it would be a sufficient signing? For any one may put a seal. No particular evidence arises from that seal; common seals are alike, and one man's may be like another's. No certainty or guard, therefore, arises from thence." In Ellis *v.* Smith, 1 Ves. Jr. 11, 13, Willes, C. J., said: "Nor do I think sealing is to be considered as signing; and I declare so now because, if that question ever comes before me I shall not think myself precluded from weighing it thoroughly and decreeing that it is not signing, notwithstanding the *obiter dicta* which in many cases were *nunquam dicta*, but barely the words of the reporters; for upon examination, I have found many of the sayings ascribed to that great man, Lord Chief-Justice Holt, were never said by him." It was held by Raymond, C. J., in Warneford *v.* Warneford, 2 Str. 764, on the authority of the *dicta* in Lemayne *v.* Stanley, 3 Lev. 1, that sealing a will was a sufficient signing within the statute of frauds; but the law of the case was very strongly doubted by the old writers. See Theo. Evid. 68; Bull. Ni. Pri. 263. And it has long since been held that that case is not law. In Wright *v.* Wakeford, 1 Ves. 454, 458, Lord Eldon said: "It is true, at one time it was decided that sealing was signing; and when it was urged that the legislature meant more than sealing, *first*, from the circumstance that sealing is not mentioned as to wills; *secondly*, as the legislature must have proposed some evidence from the handwriting of the party, the objection was that a person may sign by his mark; an act affording no material testimony; and upon such reasoning it was decided originally that sealing was signing; but upon a review of that, the contrary has been held for a long time, and so far is sealing from being equivalent to signing, that it is determined that sealing is not necessary; and that sealing without signing is not a sufficient execution of a will; the converse holding as to a deed, which cannot be without sealing and delivery. If signed, it may be a writing; but if delivered, it may be a good deed, whether signed or not; and if it is to be executed under a power with signature and sealing, both are required." And see Baker *v.* Dening, 8 A. & E. 94, 97, *per* Lord Denman, C. J.: "Sealing is one thing; signing, another." Shepp. Touchst. 60, c. 4, No. 5.

[2] 1 Cox, 219.

of mankind, it may very probably have the effect of a legal signature, and extend to the whole." [1]

The same principle was laid down in Ogilvie *v.* Foljambe [2] by Sir Wm. Grant, viz., that, provided the name be inserted in such manner as to have the effect of authenticating the instrument, the provision of the act as to the signature is complied with, and it does not much signify in what part of the instrument the name is to be found.[3]

[1] The Lord-Chief Baron, in Moore *v.* Stokes, 1 Cox, 219, 222, said: "The question in this case is whether the written note stated in the pleadings is such an agreement as is within the meaning of the statute of frauds. These are instructions to the attorney for the preparation of the lease. This is no formal signature of the defendant's name, but one term of the instructions is that the rent is to be paid to Moore; and the question is, whether the name so inserted and written by the defendant is a sufficient signing. The purport of the statute is manifest, to avoid all parol agreements, and that none should have effect but those signed in the manner therein specified. It is argued that the name being inserted in any part of the writing is a sufficient signature. The meaning of the statute is that it should amount to an acknowledgment by the party that it is his agreement, and if the name does not give such authenticity to the instrument, it does not amount to what the statute requires. Here the insertion of the name has not this effect. This memorandum might be drawn subject to additions or alterations, and does not appear to be the final agreement of the parties, and indeed as far as we can admit parol evidence, it is proved not to be so, for the subject of repairs is not mentioned in the instructions; which shows the ends of the statute are not to be obtained if so informal a paper is to be admitted as a written agreement. No case has been adduced in point; but it has been compared to the case of wills, where a name written in the introduction has been considered as a signature; but that seems to me a very different case. The cases on wills have been where the instrument, importing to be the final instrument of the party, has been formally attested, and it is in its nature complete, and the only question has been whether the form of the statute has been complied with. In the present case, I think it is by no means so, and it would be of very dangerous tendency to admit the memorandum to be an agreement within the statute." In Duncuft *v.* Albrecht, 12 Sim. 189, 196, the analysis of the holding in Stokes *v.* Moore, 1 Cox, 219, is that in that case, a further act was contemplated, and as that act was not done, there was no concluded agreement between the parties.

In Godwin *v.* Francis, L. R. 5 C. P. 295, the plaintiff, by letter, offered to buy an estate for a given sum. The defendant answered by telegram: "Your offer for the L. estate is accepted." The instructions for the message were signed by the defendant; but the telegram received by the plaintiff merely contained the names of the sender and the receiver, written, with the above telegram, by the company's clerk in the usual printed form. This was held to be a sufficient signature by the defendant under the statute of frauds, to render him liable to be charged on the contract. Brett, J., on this point said: "It being agreed that both the instructions for the telegram and the telegram itself were put in, I think there is abundant evidence that the defendant entered into such a contract as would have bound himself and the other persons for whom he professed to act, if he had had authority from them to make the contract. It has been contended that the signature of the defendant to the instructions for the telegram did not amount to a signature to the acceptance of the contract. But I think there is evidence that the defendant, when he signed the instructions, intended that to operate as his signature to the contract, and that it constituted a binding contract signed by him if he had authority to enter into it. Then it was objected that the defendant's name appearing on the paper received by the plaintiff, was insufficient because the defendant had no power to delegate to the telegraph clerk an authority to sign his name. I think, however, it must be assumed as against him that he had authority to delegate to the clerk the power to sign for him, and that the signature so placed was binding upon him. In either point of view, therefore, there was a sufficient signature to bind the principals if the defendant had authority to enter into the contract on their behalf."

[2] 3 Mer. 53, 62.

[3] In this case there was no actual sig-

In a case in the House of Lords it was held that, though it is not necessary that the signature of a party should, within the Statute of Frauds, be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate every material and operative part of the instrument. Where, therefore, the name of the party against whom specific performance was sought to be enforced, appeared in different parts of the paper, but only in such a way, that, in each case, it merely referred to the particular part where it was found, and that part was in the form of reference or description, and not of promise or undertaking; it was held that the paper did not constitute a contract signed within the provisions of the Statute of Frauds.[1] In this case, C., proposing to marry H., wrote out a paper beginning thus: "In the event of a marriage between the under-mentioned parties, the following conditions for a marriage settlement are mutually agreed upon." Then followed several

nature by the defendant, the party to be charged, but in reply to a letter from the plaintiff, the defendant wrote: "Mr. Foljambe presents his compliments to Mr. Ogilvie, and is extremely obliged to him for his note and for the very liberal and accommodating terms which he has proposed, and, in consequence of it, although Mr. F. is still of the same opinion as to the value of Mr. O.'s house, according to the times, he will not trouble Mr. O. with any further discussion, but agree to the terms first proposed, to give £14,000 for the premises, including fixtures of every description, the pier and chimney glasses, etc." This was held to be a sufficient signing to satisfy the statute. So in White *v.* Procter, 4 Taunt. 209, the writing of the purchaser's name by an auctioneer in one of the columns of his auction book, as "Mr. Stokes," was held a sufficient signing by the purchaser to take the case out of the statute, although after the sale the purchaser refused to sign the contract; denying that his agent (Stokes) had power to do so, and expressly directing him not to sign the contract. In Wilford *v.* Beazely, 3 Atk. 503, it was held, where a person subscribed a deed as a witness only, which she knew the contents of, as she signed it as a complete agreement, it was a signing within the statute. Lord Hardwicke here said: "The meaning of the statute is to reduce contracts to a certainty in order to avoid perjury on the one hand, and fraud on the other, and, therefore, both in this court and the courts of common law, where the agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon. The word *party* in the statute is not to be construed party as to a deed, but *person* in general, or else what would become of those decrees where signing of letters by which the party never intended to bind himself, has been held to be a signing within the statute? There have been cases where a letter written to a man's own agent, and setting forth an agreement as concluded by him, has been deemed to be a signing within the statute and agreeable to the provision of it." In Lobb *v.* Stanley, 5 Q. B. 174, where the defendant wrote his name at the commencement and in the body of a letter, in the third person, "Mr. Stanley," omitting his Christian name, it was held a sufficient signature of the party when, as in that case, he authenticates the instrument by writing his name in the body; and that, as the initial of his Christian name was enough, and as he might omit one of two Christian names, so his signature by his surname alone would be sufficient. So in Propert *v.* Parker, 1 Russ. & My. 625, where the defendant stated an agreement in writing, "Mr. Wilmot Parker has agreed," etc., this was held to be a sufficient signing within the statute. Bleakey *v.* Smith, 11 Sim. 150; Knight *v.* Crockford, 1 Esp. 190; Clason *v.* Bailey, 14 Johns. 487, and Penniman *v.* Hartshorn, 13 Mass. 92, are to the same effect. And see Coles *v.* Trecothick, 9 Ves. 234; Shippey *v.* Derrison, 5 Esp. 191; Schneider *v.* Norris, 2 M. & S. 286; Saunderson *v.* Jackson, 2 B. & P. 238; Hammersley *v.* De Biel, 12 Cl. & F. 45.

[1] Caton *v.* Caton, L. R. 2 H. L. 127.

sentences n which the names of C. and H. were mentioned incidentally in connection with the subjects of the proposed settlement. The name of neither party was signed to the paper, which was delivered by C. to H.'s solicitor for the purpose of his drawing the settlement. Two of the clauses in it appeared to have been stricken out by mutual arrangement. No settlement was ever executed. It was dispensed with by H. at C.'s request, upon C.'s verbal promise to give H. certain advantages by his will. C. died, and the will was not found to fulfil the promise. The House of Lords held that H. was not entitled (independently of the question whether, as a matter of fact, there had been any waiver) to specific performance of the arrangements made in the written paper, as it did not constitute a contract within the meaning of the Statute of Frauds.

And as a signing is required, where the name of the party whom it is sought to charge does not appear in the writing, even though the whole of the writing be the production of the party, this does not satisfy the statute. Thus, in Hubert *v.* Moreau,[1] where there was a letter written by the defendant, in which his name did not appear, nor was it signed by him, it was held that the statute was not satisfied. So, in Selby *v.* Selby,[2] where a letter from a mother to her son began "My dear Robert," and concluded "your affectionate mother," it was held, that this was not signed so as to constitute a binding agreement on the part of the mother within the intent of the statute. And in Hawkins *v.* Holmes,[3] where a draft of a conveyance was received by the defendant, who made several alterations therein and delivered it back to the attorney to be engrossed; it was claimed that the defendant's "altering the draft with his own hand was as a signing, it not being material to what part of the draft he had set his hand." But it was answered, that the statute requires that the party, or some person by him lawfully authorized, should sign the writing; and though the defendant had altered the draft with his own hand, yet that this could not be called a signing; that the statute requires signing as a material circumstance, which is not to be dispensed with in equity, any more than at law; that if the defendant had himself written over the whole deed with his own hand, without signing it, this had not been sufficient, for the statute has made signing absolutely necessary for the completion of the contract. And it was accordingly held by Lord Hardwicke, that, unless in some particular cases where there has been an execution of the contract by entering upon and improving the premises, the party's signing the agreement is absolutely necessary for its completion.[4]

[1] 12 Moo. 216.
[2] 3 Mer. 2.
[3] 1 P. Wms. 770.
[4] To the same effect is Ithel *v.* Potter,

In Johnson *v.* Dodgson,[1] the plaintiffs' traveller called on the defendant with samples of hops, and agreed with him for the sale of the hops in question. The defendant then wrote a memorandum in a sample book of his own, which he retained in his own possession, and which, at his request, was duly signed by the plaintiffs' traveller. The memorandum of the sale commenced: "Sold John Dodgson." This was held to be a sufficient signing by the defendant to satisfy the statute. The principle of the decision is thus stated by Lord Chief Baron Abinger: "The Statute of Frauds requires that there should be a note or memorandum of the contract in writing, signed by the party to be charged. And

1 P. Wms. 771, n.; determined at the Rolls, *Trin.*, 1719, on the same point. And see Whitbread *v.* Brockhurst, 1 Bro. Ch. Cas. 404. In Selby *v.* Selby, 3 Mer. 2, 6, Sir William Grant said, "That it is a very forced construction of the words of the statute to say that the use of the mere ordinary terms of ceremony constitutes a compliance with the regulations it prescribes. It is not enough that the party may be identified. He is required to sign. And, after you have completely identified, still the question remains, whether he has signed or not. There may be in the instrument a very sufficient description to answer the purpose of identification without a signing; that is, without the party having either put his name to it, or done some other act intended by him to be equivalent to the actual signature of the name; such as a person, unable to write, making his mark. But it was never said, because you may identify the writer, therefore there is a signature within the meaning of the statute. If so, the word 'I' or 'me' would be enough, provided you can prove the handwriting." In Hubert *v.* Moreau, 2 C. & P. 528, at *nisi prius*, the instrument relied on was written by the defendant, had no name attached to it, but something that looked like an M. It was claimed that this was a signing as required by the statute. Best, C. J., looking at it, observed: "It may be an M, or it may be a waving line; but if it be an M, I am of opinion that it is not sufficient, as the statute requires that the promise should be signed. It is not the signature of a man's name;" and refused to allow evidence to be given to show that the defendant usually signed in that way. In the case *in bank*, Hubert *v.* Moreau, 12 Moo. 216, the decision of Best, C. J., was sustained, the court saying: "The statute requires that the promise shall be in writing, and *signed* by the party. Here, the letter containing the promise is in the handwriting of the defendant, but it bears no signature. Undoubtedly, a signing by a mark would satisfy the meaning of the statute; but here there is nothing intended to denote a signature, nor does the name of the defendant appear in any part of the letter."

But, as was held by Sir William Grant, in Selby *v.* Selby, 3 Mer. 2, 5, in effect, though an agreement be not signed, where there is a reference to the agreement in some other instrument having a proper signature, that will be a sufficient signing of the agreement within the statute. In Tawney *v.* Crowther, 3 Br. Ch. Cas. 318, Lord Chancellor Thurlow said: "If the letter contains the terms of the agreement, or if it refers to another paper which contains the terms, that is sufficient; for I am of opinion, that if a letter refers so clearly to an agreement as to show what was meant by the parties, where the existence of the paper is proved by parol, that will take the case out of the statute." So, in Coles *v.* Trecothick, 9 Ves. 234, 250, Lord Eldon said: "Though the agreement is not signed, if the letter contains all the terms, and describes the consideration and all the circumstances, so that by the contents of the letter it can be connected and identified with the agreement, the letter, which not only is not a signature, but is the last of all things that can be called signing the agreement, is a writing signed; which, ascertaining the contents of the agreement, amounts to a note or memorandum of it, and therefore satisfies the statute." We examine fully, *infra*, many of the important cases relating to the connecting of papers to furnish the written evidence required by the statute. As to the actual holding in Tawney *v.* Crowther, 3 Br. Ch. Cas. 318, see *per* Lord Redesdale in Clinan *v.* Cooke, 1 Sch. & Lef. 33. And see Blagden *v.* Bradbear, 12 Ves. 471; Hinde *v.* Whitehouse, 7 East, 558; Saunderson *v.* Jackson, 2 B. & P. 238; Allen *v.* Bennett, 3 Taunt. 169; Western *v.* Russell, 3 Ves. & B. 187.

1 2 M. & W. 653.

the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and recognized by him. I think in this case the requisitions of the statute are fully complied with. The written memorandum contains all the terms of the contract; it is in the defendant's own handwriting, containing his name, and it is signed by the plaintiffs through their agent."[1]

Although, as we have seen, sealing is not signing within the meaning of the statute, yet it is well settled that a signature may be by a mark intended for a signature by an illiterate person;[2] or by

[1] In this case counsel asked: "Suppose the defendant had simply made a memorandum in his own book that on such a day the plaintiffs sold to him, would that be sufficient?" Parke, B., replied: "If he meant it to be a memorandum of a contract between the parties, it would; not so if he meant it to be a mere memorandum to be kept by him for himself." And, in his judgment, Parke, B., also said: "Here the entry was written by the defendant himself, and required by him to be signed by the plaintiffs' agent. That is amply sufficient to show that he meant it to be a memorandum of contract between the parties." Of course, these observations are based on the fact that the memorandum referred to has been signed to satisfy the statute.

[2] The first reported case in which it was questioned whether the statute of frauds is satisfied by a marksman making his mark for a signature, seems to have been Harrison *v.* Harrison, 8 Ves. 185, A. D. 1803. There, of the three witnesses who attested a will, two of them did so by setting their marks. On the authority of an unreported case in the Court of Common Pleas, Gurney *v.* Corbet, in A. D. 1710, where a will devising real estate, one of the witnesses being a marksman, was held well executed; Lord Eldon, in Harrison *v.* Harrison, 8 Ves. 185, sustained the will, stating, on the authority of Mr. Serjeant Hill, that there had been a great many other cases similarly decided. This holding was followed by Sir William Grant, in Addy *v.* Grix, 8 Ves. 504. In Grayson *v.* Atkinson (A. D. 1752), 2 Ves. Sen. 454, 456, it is said by counsel that "any solemn act, as putting a mark, is the same as signing;" and in the marginal note of the case it is said to have been held that the attestation of marksmen is good under the statute of frauds. But this point does not seem to have been in question in the case, and the inference is that in this case all the witnesses attested the will by their signatures. The question, however, is now well settled, that while sealing is not signing, to satisfy the statute, the signing with a mark, by a marksman, intended for a signature, satisfies the statute. See *per* Lord Eldon, in Wright *v.* Wakeford, 17 Ves. 454, 459. In Baker *v.* Dening, 8 A. & E. 94, it was held, under §§ 5 and 6 of the statute (29 Car. 2, c. 3), the making of a mark by a devisor is a sufficient signing, and that it is not necessary to prove that he could not write his name at the time. It was conceded there, that where a party is unable to write, the affixing of his mark is a sufficient signature; that where a party cannot write, his mark is, in fact, his only signature; and that, therefore, the case may fall within the equity of the statute. But it was claimed that this did not apply to the devisor, who, it was to be assumed, could have written his name at the time when he made his mark. But the court refused an inquiry into the matter, Lord Denman, C. J., saying: "If there were any doubt at all on this question, it would be very fit that it should be considered; but if there be none, we ought not to create any by granting a rule. It has been urged that sealing is insufficient; but sealing is one thing, signing another. The mark of a person not capable of writing is allowed to be sufficient; and I never heard of any

stamping a name as a signature to the memorandum in writing.[1] So, the name of the vendor *printed* in a bill of parcels, in which the name of the purchasers was inserted in the handwriting of the vendor, was held to be a sufficient signing to satisfy the statute.[2] And

inquiry being made whether the party making the mark was, at the time, capable of writing. Here it was certainly a matter of doubt whether the party could or could not write at the time. It is not clear that he could. I think it much better that there should be no inquiry on such a point." Littledale, J., in his judgment in the same case, said that under the statutes of 3 and 4 Ann, c. 9, § 1, and 17 Geo. 3, c. 30, § 1, which require signing, the requisite is satisfied by a mark. Under the statute of limitations (21 Jac. 1, c. 16, as affected by 9 Geo. 4, c. 14. § 1) the signing must be "by the party chargeable thereby," differing in this respect from the statute of frauds. Under the former act, it was held that a letter written by the defendant's wife, in her husband's name, and sent by him to the plaintiff, was not within the act. Hyde *v.* Johnson, 2 Bing. N. C. 776. And see Whippy *v.* Hilary, 3 B. & Ad. 399. In the former of these cases it was claimed that according to this construction of the statute, a party unable to write would never be capable of making a binding acknowledgment of a debt. But it was answered that the signature could be by affixing a mark, as in other cases. And Tindal, C. J., dealing with the point, said: "Some inconveniences have been pressed in the course of the argument upon our attention, in cases where a total inability of parties to sign may exist; but the nature of the signature which is necessary to comply with the requisites of the statute is such, as to make it almost impossible to suppose a case in which a party could not make such a signature as could satisfy the statute." Hyde *v.* Johnson, 2 Bing. N. C. at p. 780. And see Toms *v.* Cuming, 7 M. & G. 88; Lewis *v.* Roberts, 11 C. B. N. S. 23; Trotter *v.* Walker, 13 C. B. N. S. 30; Brumfitt *v.* Bremner, 9 C. B. N. S. 1, 15; Hubert *v.* Moreau, 12 Moore, 216; Selby *v.* Selby, 3 Mer. 2, 6, *per* Sir William Grant.

[1] *Per* Le Blanc, J., in Schneider *v.* Norris, 2 M. & S. 286, 289: "Suppose the defendant had stamped the bill of parcels with his own name, would not that have been sufficient? Such a stamping, as it seems to me, if required to be done by the party himself or by his authority, would afford the same protection as signing." The question, however, does not seem to have been expressly decided in the law courts in England until the comparatively recent case of Bennett *v.* Brumfitt, L. R. 3 C. P. 28. The question came up there under the 6 Vic. c. 18, § 17, which requires that a notice of objection to a registration "shall be signed by the party objecting." The usual signature of the objector was engraved in *fac-simile* on a stamp, and the objector impressed this stamp upon his notice of objection. It was held that this stamping was a sufficient signing within the statute, and it was also there considered, on the reasoning of Lobb *v.* Stanley, 5 Q. B. 574, to be a good signing under the statute of frauds, and under the statute of wills. The ground of the decision is well stated by Bovill, C. J.: "The ordinary mode of affixing a signature to a document is not by the hand alone, but by the hand coupled with some instrument, such as a pen or pencil. I see no distinction between using a pen or a pencil and using a stamp, where the impression is put upon the paper by the proper hand of the party signing. In each case it is the personal act of the party, and to all intents and purposes a signing of the document by him. If the objector here had used a pencil or a paint-brush, it would hardly have been contended that he had not signed the notice." The question was similarly decided by Sir C. Cresswell in the Court of Probate a few years previously (A. D. 1863). There, in Jenkins *v.* Gaisford, 3 Swab. & Tr. 93, it was held that as signing may be by making a mark, and it can make no difference whether the mark is made by a pen, or some other instrument, therefore a signature impressed with a stamp satisfies the statute. And see, in accord, In goods of Emerson, 9 L. R. Ir. 443.

[2] Schneider *v.* Norris, 2 Man. & S. 286. In this case the bill of parcels was headed, "London, 24th October, 1812. Messrs. John Schneider & Co. bought of Thomas Norris & Co.;" the name of "John Schneider & Co." being written by the defendant, the name of the defendant being printed. Then followed a list of the articles sold, with the particulars, including quantities and prices. In an action for the non-delivery of the goods sold, it was claimed that there was no note in writing of the contract signed by the defendant. But the court held that the defendant, by his having written the vendee's name, acknowledged what he had written to be for the purpose of exhibiting his recognition of the contract; and that

it seems clear that the signature may be written with a pencil;[1]

his printed name was thus recognized as a signature sufficient to take the case out of the statute. And in Saunderson *v.* Jackson, 2 B. & P. 238, Lord Eldon was of the opinion that the printed name in a similar bill of parcels was a sufficient signing of it to satisfy the statute; and there says on the point: "This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract within the meaning of the statute. The single question therefore is, Whether if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as by his written name. It has been decided (Knight *v.* Crockford, 1 Esp. 190; Lemayne *v.* Stanley, 3 Lev. 1) that if a man draw up an agreement in his own handwriting, beginning, 'I, A. B., agree, etc.,' and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed. This last case is stronger than the one now before us, and affords an answer to the argument that this bill of parcels was not delivered as a note or memorandum of the contract."

[1] In Mr. Sumner's note to Seton *v.* Slade, 7 Ves. 265, n. (*c*), it is said: "The signature may be with a lead pencil." The authorities, however, cited in the note are not in point. And we have seen it stated that the point has never been determined. But see the unquestionably sound *dictum* of Bovill, C. J., in Bennett *v.* Brumfitt, L. R. 3 C. P. 28, quoted by us in note, *supra*. In Jeffrey *v.* Walton, 1 Stark. 267, a memorandum in pencil was received by Lord Ellenborough as evidence of an agreement. In Rymes *v.* Clarkson, 1 Phillim. 22, Sir John Nicoll was of opinion that a will written by a testator with a pencil would be valid, provided that the court could be satisfied that he intended so to execute his will. In Green *v.* Skipworth, 1 Phillim. 53, a disposition made by a testator in pencil was carried into effect; and in Dickinson *v.* Dickinson, 2 Phillim. 173, alterations in pencil on a regularly executed will were admitted to probate. Sir John Nicoll said there was no doubt that in point of law they must be considered as equally valid as if made in ink, provided the deceased intended them to take effect. It was held in Geary *v.* Physic, 5 B. & C. 234, that an indorsement in pencil on a promissory note was good; Bayley, J., there saying: "I think that a writing in pencil is a writing within the meaning of that term at common law, and that it is a writing within the custom of merchants. I cannot see any reason why, when the law requires a contract to be in writing, that that contract shall be void if it be written in pencil. If the character of the handwriting were thereby wholly destroyed, so as to be incapable of proof, there might be something in the objection; but it is not thereby destroyed, for, when the writing is in pencil, proof of the character of the handwriting may still be given. I think, therefore, that this is a valid writing at common law, and also that it is an indorsement according to the usage and custom of merchants; for that usage only requires that the indorsement should be in writing, and not that that writing should be made with any specific materials." And see McDonnell *v.* Chambers, 1 Stobh. Eq. 347; Merritt *v.* Clason, 12 Johns. 102; Clason *v.* Bailey, 14 Johns. 484; Draper *v.* Pattina, 2 Speers, 202. Where the signature is by pencil, the question is whether it was intended by the signer as a final act; or whether it was merely deliberative, and it will be treated according as it was the one or the other. In the Goods of Adams, L. R. 2 Pro. & Div. 367; Lucas *v.* James, 7 Hare, 410, 419; Francis *v.* Grover, 5 Hare, 39; Martins *v.* Gardiner, 8 Sim. 73; Ravenscroft *v.* Hunter, 2 Hagg. 68; Mence *v.* Mence, 18 Ves. 348; Hawkes *v.* Hawkes, 1 Hagg. 321; Edwards *v.* Astley, 1 Hagg. 490. Probate was granted in *In re* Dyer, 1 Hagg. 219, of a will written entirely in pencil by the deceased, who, a few days before death, declared she wished it to operate unless altered. On the other hand, in Rymes *v.* Clarkson, 1 Phillim. 22, 35, where a codicil to a will was written in pencil, the codicil being neither signed nor dated, Sir John Nicoll, in revoking the probate of the codicil, holding that it was merely a deliberative and not a final act, said: "It has been objected that it is written in pencil. To this it has been replied that the deceased had a right to write his will with a pencil, or to write his will and three codicils in ink, and a fourth in pencil; and so he has, undoubtedly, and it would be valid in law, provided the court could be satisfied that he intended so to do. For instance, if he had added, I have written this codicil in pencil, but intend it shall operate as my will; or if it could be accounted for by showing that he had no other materials, as it was permitted to the dying soldier to write his will with

as, also, that the signing by initials would suffice to satisfy the statute.[1]

his sword in the dust. But when the question to be decided is the previous one, whether he did intend this paper as the final declaration of his mind, and as a codicil, or whether it was merely preparatory to a more formal disposition; the material with which it is written becomes a most important circumstance, and the importance of it is still further increased when the court sees that the deceased made other codicils, all formally written in ink, one before this paper, others possibly after it. Then the natural and rational conclusion is, that this was a mere memorandum for future deliberation, and not a finished instrument intended at all events to become a part of his will, or, as far as it goes, to alter and control both that previous will and a codicil regularly executed." In Merritt *v.* Clason, 12 Johns. 102, it was contended that the memorandum was not sufficient because it was written with a lead pencil, counsel contending that if it was, then a writing on a slate or with chalk on a door or wall would be a good memorandum within the statute; and that it might be completely effaced in a moment with India rubber and another contract written in its place without the possibility of detecting the fraud. But the court held that the signing with a pencil was good; Platt, J., in delivering the judgment of the court, saying: "I have no doubt that the memorandum required by the statute may as well be written with a lead pencil as with a pen and ink; and it is observable that in most of the reported cases on this head the memoranda were written with a lead pencil, and no counsel until now has ever raised that objection" (A. D. 1815). As a matter of fact, in connection particularly with sales at auction, the very common custom for the auctioneer is to enter the purchaser's name in pencil. Ives *v.* Hazard, 4 R. I. 14, also holds that a signing with a pencil satisfies the statute.

[1] Benjamin says: "Whether a signature by initials would suffice seems not to have been decided expressly." Benj. on Sales, § 257. The question seems to us one which is quite well settled in England, Ireland, and in this country, and in each case without the expression of a doubt. In Chichester *v.* Cobb, 14 L. T. N. S. 433, a letter beginning with, "My dear M. A.," and signed by the defendant with his initials, "E. C.," was held to show an absolute promise by the defendant to satisfy the statute of frauds. So, in the Supreme Court of the United States, where the memorandum of the contract was signed by the defendant and by the agent of the plaintiffs, each with his respective initials, the memorandum was held sufficient to take the case out of the statute. Salmon Falls Manuf. Co. *v.* Goddard, 14 How. 446. In Sanborn *v.* Flagler, 91 Mass. (9 Allen), 474, the note in writing of the contract was, "Will deliver J. R. & Co. best refined iron," etc., and was signed, "J. H. F.; J. B. R.,"—"J. H. F." being the initials of the defendant, as one of the firm of Holdane & Co.; and "J. B. R." the initials of one of the members of Sanborn, Richardson, & Co., the plaintiffs. Bigelow, C. J., delivering the judgment of the court, said: "It is hardly necessary to add that the signature is valid and binding, though made with the initials of the party only, and that parol evidence is admissible to apply them."

On the same principle, it was held by the Supreme Court of the United States, in Barry *v.* Coombe, 1 Peters, 640, that the use of initials in the description of the subject-matter of the contract, in the memorandum of the contract, in writing, to satisfy the statute, as the "E. B." wharf and premises, was sufficient; and that parol evidence was admissible to explain what the "E. B." wharf and premises were. So, again, in Abbot *v.* Massie, 3 Ves. 148, legacies to "W. G." and "Mrs. G." were, as abstract questions on the point we are considering, well bequeathed to the parties intended to take, which was open to proof by parol evidence. And in Price *v.* Page, 4 Ves. 679, a legacy to "—— Price, the son of —— Price," was sustained, parol evidence having been admitted to show that the plaintiff was the legatee in question. In Ireland, In the Goods of Emerson, 9 L. R. Ir. 443, the testator *stamped* his initials on his will, and it was held that the will was sufficiently signed by him. And see Gorrie *v.* Woodley, 17 Ir. C. L. R. 221. And see Caton *v.* Caton, L. R. 2 H. L. 127, 143, where Lord Westbury treated the initials of the parties in the memorandum under the statute of frauds as being equivalent to their names. And in Jacob *v.* Kirk, 1 Moo. & Rob. 221, the signature of the defendant by his initials in pencil, was evidently considered by Parke, B., as a sufficient signature to satisfy the statute; but the memorandum was held to be defective under the statute because it did not name the other party to the contract. And see Phillimore *v.* Barry, 1 Camp. 513, where the initials of one of the members of the firm, "I. M. F.,"

As, under both the fourth and seventeenth sections of the statute, the note or memorandum in writing is required to be signed by only the party or parties to be charged by the contract, bargain, or agreement; it is now conclusively decided that it is sufficient, to bind the party or parties whom it is sought to charge by the contract, if he or they respectively have signed the note or memorandum of the contract, even though the other party or parties to the contract may not have done so.[1]

signed by the auctioneer to a memorandum of the contract, was held to be a sufficient signing by the defendants, by their agent, to satisfy the statute; the defendants by their letter having recognized the sale. See also Sweet *v.* Lee, 4 Sc. N. R. 77, 85, 90, where it was held that a memorandum signed with the initials of the parties, "T. L.; S. S.," was open to be explained by parol as to this. But it was held bad as a memorandum of a contract not to be performed within a year, and showing no consideration; and, on *that* ground, it was held not to satisfy the statute. Mr. Benjamin seems to have been led to his doubts in the matter by the *nisi prius* holding in Hubert *v.* Moreau, 2 C. & P. 528 (stated by us *supra*); but, as he himself points out, after saying, "In the report of the same case, as given in 12 Moore, 216, the language of the court, in refusing the new trial, would indicate that as a question of *fact* there was no mark append[illegible] to the writing and placed there by the [illegible]iter with the intention of making it his s[illegible]ma." adds, "The chief justice put the [illegible]n follows: 'Undoubtedly the signing by a mark would satisfy the meaning of the statute; *but here there is nothing* intended to denote *a signature*, nor does the name of the defendant appear in any part of the letter.'" Benj. on Sales, § 257. Chief Justice Best's further statement was: "The statute requires that the promise . . . shall be in writing, and *signed* by the party. Here the letter containing the promise is in the handwriting of the bankrupt, *but it bears no signature.*" Hubert *v.* Moreau, 12 Moo. at p. 218. We think it quite clear that a signing by initials, where it is intended thereby to authenticate the instruments, is a perfectly good signing to satisfy the statute.

In Wilson *v.* Beddard, 12 Sim. 28, 33, where it was held, that if a testator, who is unable from illness to sign his will, has his hand guided in making his mark, it is a sufficient signature within the statute of frauds; it was contended that the law was wrongly laid down. The vice-chancellor, in reply, said: "Next it was contended that what the learned judge said with reference to the testator's hand being guided when he made his mark to his will, was not law. The judge said that it was necessary that the will should be signed by the testator, not with his name, for his mark was sufficient if made by his hand, though that hand might be guided by another person; and, in my opinion, that proposition is correct in point of law. For the statute of frauds requires that a will should be signed by the testator, or by some other person in his presence and by his direction; and I wish to know if a dumb man who could not write were to hold out his hand for some person to guide it, and were then to make his mark, whether that would not be a sufficient signature of his will. In order to constitute a direction, it is not necessary that anything should be said. If a testator in making his mark is assisted by some other person, and acquiesces and adopts it, it is just the same as if he had made it without any assistance." On the principle of agency, such a signing would also be good under the 4th and 17th sections of the statute.

[1] Egerton *v.* Mathews, 6 East, 307; Stadt *v.* Lill, 9 East, 348; Laythoarp *v.* Bryant, 2 Bing. N. C. 735; Buckhouse *v.* Crosby, 2 Eq. Cas. Ab. 33; Seton *v.* Slade, 7 Ves. 275; Coles *v.* Trecothick, 9 Ves. 250; Tawney *v.* Crowther, 3 Br. Ch. Cas. 161, 318; Hatton *v.* Gray, 2 Br. Ch. Cas. 164; Lord Armond *v.* Anderson, 2 Ball & B. 370; Western *v.* Russell, 2 Ves. & B. 192; Emmerson *v.* Heelis, 2 Taunt. 38; Allen *v.* Bennett, 3 Taunt. 169; Saunderson *v.* Jackson, 2 B. & P. 238; Champion *v.* Plummer, 1 B. & P. N. R. 252; Fowle *v.* Freeman, 9 Ves. 351; Bowen *v.* Morris, 2 Taunt. 387; Knight *v.* Crockford, 1 Esp. 190. In Laythoarp *v.* Bryant, 2 Bing. N. C. at p. 746, Vaughan, J., points out and disposes of a misconception which has existed as to the holding of Wain *v.* Warlters, 5 East, 10, thus: "That decision never turned on the ground that the mutuality of a contract must appear, but only that the note or memorandum must show the consideration as well as the promise, otherwise all the inconveniences would prevail which the statute was meant to obviate." The very opposite of this is

But, as there is no contract, bargain, or agreement without mutuality, the mere fact that a written note or memorandum of that which, on its face, purports to be a contract, in which the names of the parties, the subject-matter, and the consideration are stated, is signed by one whom it is sought to charge thereunder, does not, of itself, constitute a contract, and will not be sufficient, unless it be, in fact, a note or memorandum of a *contract*, *bargain*, or *agreement*, assented to by both of the parties to it, to bind the party whom it is sought to charge.

Hence it results from these two principles, namely, that there can be no contract, bargain, or agreement without the *aggregatio mentium*; the *consensus ad idem*; the meeting of minds; and, that, as the statute only requires that the written note or memorandum of the contract, bargain, or agreement, must be signed by the party or parties to be charged therewith or thereunder; that such contract can only be enforced by showing *the assent* to it by the party or parties seeking to enforce it, in order to show that there is a contract at all; and, second, that such assent, which, with the written note or memorandum, shows the *aggregatio mentium;* the *consensus ad idem;* the mutuality; can be shown, either by the writing itself, when signed by both the parties, or *dehors* the writing relied on to charge the party to it who has signed it; and that this evidence *aliunde* of assent may be either by other written or by verbal evidence.[1]

In Laythoarp *v.* Bryant,[2] where it is held that the consideration must appear in the writing, but that the assent of the other party

stated in Wood on Frauds, 653, n. 2, thus: "The note or memorandum of the agreement for the sale and purchase of lands, or of any interest in or concerning them, need not be drawn up in technical language, or in words of form, *but there must be written evidence of an aggregatio mentium, or mutual agreement, on the part of the vendor and purchaser to sell and to buy.*" This is opposed to the principle of all the above-cited cases, and is not law. The context of the above quotation clearly shows that the author is confounding the *mutuality*, which, as we have shown fully in our last preceding Part, need not appear in or by the writing, with the *consideration*, which must so appear. Bayley, J., in Saunders *v.* Wakefield, 4 B. & Ald. 601, relied on by Wood, merely points out that there must be a consideration stated in the writing, and makes no reference whatever to the necessity of the mutuality so appearing, while the whole case, and the numerous authorities cited on p. 597 *et seq.*, make it clear that the mutuality need not so be shown. The case itself merely holds that, under the statute, the consideration as well as the promise must be in writing, and that parol evidence of the consideration is inadmissible. See the whole question fully discussed in our last preceding Part. And see Smith *v.* Neale, 2 C. B. N. S. 67.

[1] In Dykers *v.* Townsend, 24 N. Y. 57, 59, the view was expressed that to make a contract for the sale of goods binding under the statute, the note or memorandum in writing should be signed by both of the parties to the contract. But in the later case of Justice *v.* Lang, 42 N. Y. 493, 501, the sounder view was taken, in accordance with the previously well-established law, that it was only necessary to be signed by the party to be charged thereby. This has always been held the law in the courts in the State of New York itself. See Clason *v.* Merritt, 14 Johns. 484; Ballard *v.* Walker, 3 Johns. 60; Roget *v.* Merritt, 2 Caines, 117; Davis *v.* Shields, 26 Wend. 341.

[2] 2 Bing. N. C. 735, 743.

to the contract, which, with the written note or memorandum of the contract relied on by the party seeking to enforce it, makes the *agreement*, the mutuality; Tindal, C. J., says: "There has been a little confusion in the argument between the *consideration* of an agreement and *mutuality* of claims. It is true the consideration must appear on the face of the agreement. . . . I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. *The agreement, in truth, is made before any signature.*" And where the agreement is not the result of correspondence, or of a written proposal, subsequently assented to, such is usually the case. But this "agreement" must always exist, or there is no bargain or contract.[1]

In Allen *v.* Bennet,[2] there was a note or memorandum of the contract signed by the sellers of goods, but not by the buyer, whose name, as purchaser, did not appear in the writing. While it was held that this want might be supplied by the subsequent letters of the sellers, it was, in effect, conceded and held, that the *assent* of the purchaser might be shown by other evidence than that of the written note or memorandum of the contract; such assent being necessary to constitute a contract. Thus, Lord Mansfield says: "The objection is not that there is no *assent* of the plaintiff, but that it does not appear by the memorandum who the buyer was." And again, "The defendant's counsel distinguishes between an order and an agreement to buy; but if I go to a shop and order goods, do not I agree to buy them? The objection is that the name of the buyer does not appear in this book, *but if it sufficiently appears that a sale was agreed on*, I see no objection why it should not be made out what was the name of the buyer by the writing of these very defendants. . . . It was then objected that one party who has not signed is not bound, but the fact was the same in the cases of Egerton *v.* Mathews,[3] and Champion *v.* Plummer,[4] and the objection was never taken in either of these cases; but the whole of this case supposes that the plaintiff *had agreed. Suppose he has not contracted by writing, he has by parol.*" And the contract was sustained against the sellers. Heath, J., concurred with the views expressed by Lord Mansfield, and said that it had been decided that a voidable promise is a sufficient consideration for a promise.

So, in Shortrede *v.* Cheek,[5] where the note in writing, signed by defendant, referred to a note to be withdrawn, the withdrawing of which was the consideration for the defendant's promise in the

[1] See *per* Bosanquet, J., 2 Bing. N. C. 747 *et seq.*
[2] 3 Taunt. 169.
[3] 6 East, 307.
[4] 1 B. & P. N. R. 252.
[5] 1 A. & E. 57.

writing; Parke, J., in his judgment, said: "The consideration being executory, the plaintiff is to show that he has fulfilled it, and for that purpose, must of necessity prove by parol evidence that the note withdrawn by him was the thing meant by the agreement." Here the consideration for the promise sufficiently appeared by the writing, but the accepting (assenting to) and acting on it were shown by parol.

The matter is dealt with in Warner *v.* Willington.[1] There, one of the grounds of a demurrer to a bill for specific performance was that the note or memorandum in writing, under the fourth section of the statute, was not a memorandum of *agreement*, but only of an offer or proposal, which the defendant, who had signed the writing, retracted before it was accepted by the plaintiff. The court said: "Now, there is a clear distinction between a memorandum of *offer*, and a memorandum of *agreement*. In the case of an offer, no doubt the party signing it may at any time before acceptance retract, but, if it be an agreement, though signed by one party alone, he cannot retract at his pleasure, but all he can do is to call upon the other party to sign or rescind the agreement. *A memorandum of agreement supposes that the two parties have verbally made an actual contract with each other; and when the terms of such contract are reduced into writing and signed, that is sufficient to bind the party signing;* but if the memorandum is of an offer only, that assumes that there has been no actual contract between the parties. . . . This raises another question, viz., whether acceptance can be by parol without writing, and it is singular that I cannot find any case in which it is determined that parol acceptance of a written proposal is sufficient. But I think upon principle that parol acceptance would be sufficient, because when one party has signed a written proposal, and the other expressly accepts it by parol, — as if he says in express terms, 'I accept the proposal,' — it appears that it reduces it to a case of *parol agreement come to between the parties, and a memorandum of the agreement signed by one*, in which case it is clear that the signature of one party is sufficient to bind him, although the other has not signed."

In this case, it was assumed, on this reasoning, that a written proposal may be accepted by parol, so as to make it binding as an agreement on the party who has signed it; but it was held that such acceptance must be unambiguous and unconditional, — that, in fact, there must be clear evidence of the acceptance of, or assent to, the actual contract sought to be enforced against the party who has signed the note or memorandum in writing. But, in

[1] 3 Drew. 523, 531.

Gibbins *v.* The N. E. Met. Asylum District,[1] where the defendants' agent wrote the plaintiff's agent an offer of £3000 for a specified property, to which the plaintiff's agent replied "We accept your offer;" adding, with reference to an enclosed memorandum in writing, embodying in more formal words "*the terms of the said contract*," "If you approve of the enclosed, sign the same, and on receipt of the deposit, we will sign you a copy;" it was held that there had been a sufficient acceptance of the contract by the plaintiff to bind the defendants.[2]

In Smith *v.* Neale[3] it was expressly held that a written proposal, containing the terms of a proposed contract, signed by the defendant, and verbally assented to by the plaintiff, is a sufficient agreement within the fourth section of the Statute of Frauds. In this case there was a note in writing of the contract, signed by the defendant, and orally accepted by the plaintiff. The court held, following the opinion expressed by Vice-Chancellor Kindersley, in Warner *v.* Willington,[4] that a proposal signed by the person to be bound, and verbally accepted by the person to whom it is made, is a sufficient agreement to satisfy the statute.

In Coleman *v.* Upcot,[5] Lord Keeper Harcourt "decreed defendant to perform this agreement, for that it was directly within the Statute of Frauds, as being an agreement signed by the party to be charged with the same, and there was no need of its being signed by both parties; and plaintiff by his bill had submitted to perform his part of the agreement. This, though it was not at first a contract, but conditionally only if the other would accept it; yet, when the other had accepted of it, it was all one."[6]

In the Liverpool Borough Bank *v.* Eccles,[7] J. & Co. being indebted to the plaintiffs, bankers; the defendants, by a writing expressed to be made between the plaintiffs and defendants, in consideration of the agreement thereinafter contained on behalf of the plaintiffs, agreed that they would pay all moneys which then were or at any time should be due from J. & Co. to the plaintiffs, not exceeding £35,000, by instalments of £3000 a year

[1] 11 Beav. 1.

[2] And see Skinner *v.* McDonall, 1 De G. & Sm. 265; Kennedy *v.* Lee, 3 Mer. 455; Fowle *v.* Freeman, 9 Ves. 351; Morgan *v.* Halford, 1 Sm. & G. 101, 106; Abbott *v.* Sworder, 4 De G. & Sm. 448, 458; Wood *v.* Midgly, 5 De G. M. & G. 41, 45; Prince *v.* Prince, L. R, 1 Eq. 490, 493; Dunlop *v.* Higgins, 1 H. L. Cas. 381, 394; Adams *v.* Lindsell, 1 B. & Ald. 681; Countess of Dunmore *v.* Alexander, 9 Shaw & Dun. 190; Head *v.* Diggon, 5 M. & Ry. 97; Thomas *v.* Deering, 1 Keen, 729; The Liverpool Borough Bank *v.* Eccles, 4 H. & N. 139; Baumann *v.* James, L. R. 3 Ch. 508; Cave *v.* Hastings, 7 Q. B. Div. 125; Long *v.* Millar, 4 C. P. Div. 450; Charlewood *v.* Duke of Bedford, 1 Atk. 497; Ogilvie *v.* Foljambe, 3 Mer. 53, 61.

[3] 2 C. B. N. S. 67.

[4] 3 Drew. 532.

[5] 2 Eq. Cas. Ab. 45.

[6] See Boydell *v.* Drummond, 11 East, 142; Donellan *v.* Read, 3 B. & Ad. 898; Cherry *v.* Heming, 4 Ex. 631.

[7] 4 H. & N. 139.

for five years, and two subsequent annual instalments of £10,000; and, in consideration of the above, the plaintiffs agreed that they would not charge more than 5 *per* cent. interest to J. & Co.; and when all debts of J. & Co., except £15,000 should have been paid, would grant them a full release. This agreement was signed by the defendants, and handed by them to the plaintiffs, who had pressed for it. The plaintiffs had acted upon it, but never executed it. It was held, that the agreement was binding upon the defendants, notwithstanding that it had not been executed by the plaintiffs.[1]

[1] Pollock, C. B., said: "In Warner *v.* Willington, 3 Drew. 523, Vice-Chancellor Kindersley adopts the doctrine that where there is a proposal signed by the person intended to be bound, and accepted by word of mouth, it is sufficient. If the point had raised more doubt in our minds we should have been bound by the authorities, and it would have been necessary for the defendants to have recourse to a court of error to alter the rule which has been laid down. So far as the case rests on the Statute of Frauds the defendants are concluded by authority. In Champion *v.* Plummer, 1 B. & P. N. R. 254, though one would have supposed that the agreement was intended to be mutual, the court held that if a party agrees in writing duly signed to buy, the agreement of the other party to sell being by word of mouth, the party agreeing to buy is bound, though the agreement would not have been enforceable against the other." And Martin, B.: "If I were not of the same opinion I should feel myself bound by Laythoarp *v.* Bryant, 2 Bing. N. C. 735. The doctrine of that case has been recently recognized in Smith *v.* Neale, 2 C. B. N. S. 67, and can only be impeached in a court of error. The presumption is that this document, having been signed and handed to the bank, was intended to be binding. In Sheppard's Touchstone, 285, it is said: 'If lands be limited to a man by way of use, or granted immediately by feoffment, gift, grant, or release, or goods or chattels be given or granted to a man, in these cases the things granted shall be said to be in the parties, and the grant good, before notice and agreement, and until disagreement. The law presumes that every grant is for the benefit of the party, and, therefore, until the contrary is shown, supposes an agreement to the grant.' That is the general rule. If the defendants had chosen when the agreement was handed to the bank to say that it should not be binding unless signed by both parties, they might have done so. But there is nothing that leads to the presumption that such was their intention. In a recent case, where a promissory note, to be executed by two sureties, was signed only by one, I left it to the jury to say whether the nature of the transaction did not show that the understanding was that the surety who executed was not to be liable unless both signed. But that is a different matter." And Channell, B.: "I agree that the rule must be discharged. Suppose that the plea had simply stated that the agreement was not signed or executed, it would have been open to demurrer on the grounds disclosed in Laythoarp *v.* Bryant, 2 Bing. N. C. 735. The decisions in that case and Smith *v.* Neale, 2 C. B. N. S. 67, are binding upon us. That disposes of the question upon the statute of frauds. But was the guarantee not otherwise agreed to in fact. Counsel argued that the understanding was that the instrument was not to be deemed complete until it was signed. If I agreed with him I should think that the plea was made out. But it does not follow, because the parties anticipated that the bank would sign, that the instrument is not binding without such signature. The bank has acted upon the instrument, and that is enough."

The same principle was laid down by Lord Cranworth in Meynell *v.* Surtees, 1 Jur. N. S. 737, in distinguishing between an offer and an agreement, thus: "There is no doubt that it [*i. e.*, the paper signed by one of the parties] does not purport to be a contract upon the face of it. It is a mere offer that they will give wayleaves upon certain specified terms; and if the parties to whom that offer was made had accepted it, and said, 'We agree to that,' or if they had done so by writing, or had without writing, by word of mouth, said, 'We will act upon it,' and had taken it, no doubt this court might have treated that as a contract; but an offer is a very different thing. When I offer anything to a person, what I mean is, I will do that if you choose to assent to it, meaning, although it is not so expressed, if you choose

It was held in The Mayor of Lyme Regis *v.* Harley[1] that the acceptance of a grant may impose a binding obligation. And Stokes *v.* Cox[2] and Wheelton *v.* Hardisty[3] show, in effect, that if the intention is that the document shall first be executed by both parties to make it binding on either, the parties must make it so in distinct terms.

The point decided by Smith *v.* Neale,[4] and which was followed in the Liverpool Borough Bank *v.* Eccles,[5] with reference to which point Kindersley, V. C., in Warner *v.* Willington,[6] says: "I cannot find any case in which it is determined that parol acceptance of a written proposal is sufficient," was really decided in an old case reported in Viner's Abridgment.[7]

In this case the defendant made an offer in a letter addressed to the plaintiff, to sell him his right to certain tithes, stating that unless the plaintiff would take them upon the terms named in the letter, the defendant would not part with them. This letter was taken by the defendant's son, with two other persons, to the plaintiff, and as soon as the plaintiff had perused the letter, he verbally accepted the terms, and the son went home and communicated the fact to his father. "The lord keeper decreed the defendant to perform this agreement, for that it was directly within the Statute of Frauds, as being an agreement signed by the party to be charged with the same, and there was no need of its being signed by both parties, and the plaintiff by his bill hath submitted to perform what was required of his part to be performed. If a man, being in company, makes offers of a bargain, and then writes them down, and signs them, and the other party takes them up, and prefers his bill, this shall be a good bargain, and the party shall be compelled to a specific performance of it. This, though it was not at first a contract, but conditionally only if the other would accept of it, yet when the other had accepted of it, it was all one, and the defendant intended it so by his sending his son with the letter, and two persons besides."

The authority of this case[8] was recognized in the latest English case on the subject,[9] where it was again held, that a proposal in writing, signed by the party to be charged, and accepted by parol by the party to whom it is made, is a sufficient memorandum or note of an agreement to satisfy the statute.[10]

to assent to it in a reasonable time. Whether that is expressed or not, such an offer, I should say, undoubtedly, even at any time, if it is not promptly accepted, is evidently, from the nature of things, revocable."

[1] 1 Bing. N. C. 222.
[2] 1 H. & N. 533.
[3] 8 E. & B. 232.
[4] 2 C. B. N. S. 67.
[5] 4 H. & N. 139.
[6] 3 Drew. 523.
[7] Coleman *v.* Upcot, 2 Vin. Ab. 527; MS. Rep. Hillary Vac. 5 Ann. A. D. 1705.
[8] Miscited there as Colegrave *v.* Upcot.
[9] Reuss *v.* Picksley, L. R. 1 Ex. 342.
[10] Willes, J., in delivering the judgment of the court, said: "In point of law what

The same sound doctrine as is established by the foregoing authorities was also recognized and acted on in Ohio, in Thayer *v.* Luce,[1] where none of the English authorities on the subject were alluded to, and where neither court nor counsel seem to have been aware of their existence.[2]

In Himrod Furnace Co. *v.* The Cleaveland, &c. R. R. Co.,[3] the same court laid down the doctrine to the same effect, thus: "A written proposal, containing the names of the contracting parties

was the effect of this assent? Putting for the moment the statute of frauds out of the question, no inquiry would be made as to the precise time at which the different parts of one single transaction took place. The question would be, Was it or was it not one transaction, and was an assent contained in it? and in this case we are of opinion that the transaction was one, and did contain an assent. But the statute of frauds introduces a new element, because it makes it necessary by section 4 that an agreement not to be performed by either party within a year must be in writing, signed by the party to be charged therewith. Now all that was signed here was not a formal agreement, but a proposal on one side, and there was an assent to that proposal on the other. All difficulty as to the terms of the proposal is out of the case. It contained the names of the parties and all the terms by reference to the letter of September 8, which must be taken to be recited in the letter of the 9th. The only question is, whether it is sufficient to satisfy the statute that the party should sign what he proposes as an agreement, and that the other party should afterwards assent without writing to the proposal? As to this it is clear, both on reasoning and authority, that the proposal so signed and assented to does become a memorandum or note of an agreement within the 4th section of the statute."

[1] 22 Ohio St. 62, 75.

[2] In the Ohio case, McIlvaine, J., in delivering the judgment of the court, says: "We think that a distinction may well be taken between an instrument of writing in the usual form of a deed of conveyance which has never been delivered for any purpose, or which has been delivered for the purpose of transferring title, and a like instrument which has been delivered merely as an evidence of an executory contract, or as evidence in part of such contract. The distinction exists in the difference of intention with which the acts were performed, and the true intent in either case must be determined by the circumstances of the act, — by the *res gestæ*. It is perfectly clear that such an instrument delivered by the apparent grantor to the apparent grantee, under such circumstances as repel the conclusion that a transfer of title was intended, is inoperative as a conveyance. And it appears to me to be just as clear that the like delivery of such an instrument, under circumstances which show an intention to make a proposition to sell the property therein described, on the terms therein written, is a legitimate and proper way to negotiate a contract of sale; and instantly that the terms thus proposed are accepted, the contract of bargain and sale is complete; not executed in fact by transfer of title, but executory, and evidenced by writing signed by the vendor, within the meaning of the statute. Nor does it matter in whose possession the instrument may afterwards be placed. The executory contract is subsisting, and will continue to be valid and binding upon the parties until mutually rescinded or consummated. Such is the case under consideration. The deed was signed by the defendant below, and delivered to the plaintiffs, not as a conveyance of title, but as an evidence of their executory contract of bargain and sale. It is true, the proof of the delivery of the instrument, and the acceptance of its terms by the plaintiffs, was made by parol testimony. To the admission of such testimony for such purposes we see no objection. The statute requires written evidence of the agreement to the extent of charging the defendant. Beyond that, the statute does not indicate the nature of the evidence required. And there is no reason why the rule requiring written evidence should be extended beyond the terms of the statute. It must be observed that the signature of the defendant only is required, and it must be further observed that verbal contracts touching the subject-matter of the statute are not declared to be void. It follows, therefore, we think, that parol testimony may be admitted for the purpose of showing that the plaintiff agreed to and concurred in the terms of the writing relied upon."

[3] 22 Ohio St. 451.

and all the terms of the proposed agreement, signed by the proponent or by some other person thereunto by him lawfully authorized, when accepted and assented to by the party to whom the same is made, is sufficient to take an action against the proponent, founded thereon, out of the operation of the Statute of Frauds. And the delivery of such instrument as a proposal, and the acceptance thereof, and assent thereto by the party to whom it is made, may be proved by parol testimony."

Ives *v.* Hazard[1] also holds that where there is a writing signed, under the statute, by the party to be charged, the assent to the contract may be shown by evidence *aliunde*.[2]

In fact, all the cases which, like Ives *v.* Hazard,[3] hold the clear doctrine that the statute is satisfied by a note or memorandum in writing, signed by the party to be charged, in effect hold, that the assent to the contract by the other party to it, whom it is not sought to charge, may be shown by parol.[4]

But, as we have stated, notwithstanding the writing is sufficient to satisfy the statute as against the party to be charged, unless there has been, in fact, an assent by the other party, as there is no mutuality, there is no contract. Thus, in Mozley *v.* Tinkler,[5] the defendant signed a guarantee to the following effect: "Mr. F. informs me that you are about publishing an arithmetic for him

[1] 4 R. I. 14.

[2] The court there said: "Now, there is here proved a contract, or memorandum of a contract, in writing, which is signed by the party here sought to be charged therewith. It is objected that the memorandum is not signed by the other party to the contract; but we do not deem it necessary that it should be signed otherwise than by the party to be charged therewith. Ordinarily, in matters not affected by the statute of frauds, a contract, if it be proved, must be held binding on both parties, though it be not in writing or signed by either party. In reference to a contract for the sale of land, the statute requires that it shall be in writing, and signed by the party to be charged therewith, in order to authorize an action upon it. This is all that the statute requires. Authorities are cited to support the proposition that it is not necessary that both parties should sign the contract. But the point does not need to be sustained by authorities. The statute plainly does not require it."

[3] 4 R. I. 14.

[4] See further, Hatton *v.* Grey, 1 Eq. Cas. Ab. 21; Fowle *v.* Freeman, 9 Ves. 351; Seton *v.* Slade, 7 Ves. 265; Donell *v.* Dow, 1 Y. & C. 355; Flight *v.* Bolland, 4 Russ. 298; Laythoarp *v.* Bryant, 2 Bing. N. C. 735; Lord Ormond *v.* Anderson, 2 Ball & B. 370; Allen *v.* Bennet, 3 Taunt. 176; Western *v.* Russell, 3 Ves. & B. 187; Stratford *v.* Bosworth, 2 Ves. & B. 341; Huddlestone *v.* Briscoe, 11 Ves. 583; Tawney *v.* Crowther, 3 Br. C. C. 161, 318; Saunderson *v.* Jackson, 2 B. & P. 238; Champion *v.* Plummer, 1 B. & P. N. R. 252; Hodgson *v.* Le Bret, 1 Camp. 233; Phillimore *v.* Barry, 1 Camp. 513; Egerton *v.* Mathews, 6 East, 307; Stadt *v.* Lill, 9 East, 348; Cooper *v.* Smith, 15 East, 103; Schneider *v.* Norris, 2 M. & S. 286; Kent *v.* Huskinson, 3 B. & P. 233; Jackson *v.* Lowe, 1 Bing. 9; Kenworthy *v.* Schofield, 2 B. & C. 945; Chase *v.* Lowell, 7 Gray, 33; Tufts *v.* Plymouth Gold Mining Co., 14 Allen, 407; Sanborn *v.* Flagler, 9 Allen, 470; Johnson *v.* Trinity Church Society, 14 Allen, 123; Stoddert *v.* Vestry of P. T. Parish, 2 Gill & J. 227; Barry *v.* Combs, 1 Pet. 64; Penniman *v.* Hartshorn, 13 Mass. 87; Clason *v.* Bailey, 14 Johns. 488; Gale *v.* Nixon, 6 Cow. 445; L'Amoreux *v.* Gould, 3 Seld. 349, Lent *v.* Padelford, 10 Mass. 236; Attwood *v.* Cobb, 16 Pick. 232; Rogers *v.* Saunders, 16 Me. 97; Bean *v.* Burbank, 4 Shepl. 488; Douglass *v.* Spears, 2 N. & McC. 207; Roget *v.* Merritt, 2 Caines, 117.

[5] 1 C. M. & R. 692.

and another person, and I have no objection to being answerable as far as £50. For my reference, apply to B. & Co." The court held that, there being no evidence of notice to the defendant of the acceptance of this offer by the plaintiffs, the defendant was not bound. McIver *v.* Richardson,[1] is to the same effect.[2]

In the Dayton, &c. Turnpike Co. *v.* Coy,[3] the defendant signed a written memorandum agreeing to do certain work or pay for it, provided the plaintiffs, an unincorporated company, located their road as he specified. Subsequently, the plaintiffs, on becoming incorporated, located their line as specified, but it was held that as there was no contract between the parties the defendant was not liable. So, in Jackson *v.* Galloway,[4] it was held that a request on the one side, coupled with an assent on the other, makes the *aggregatio mentium* which constitutes an agreement.[5]

The following memorandum of sale, which was made by the brokers of both parties, was held by the Supreme Court of the United States to bind both parties to the contract, under the New York Statute of Frauds: "New York, July 10, 1867. Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thompson & Co., New York, seven hundred and five (705) packs first quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters (12¾) cents per pound, gold, cash, actual tare. Iron due about Sept. 1, 1867. White & Hazzard, Brokers." The defendants contended, that, under the New York Statute of Frauds, this contract was not obligatory upon them; that the memorandum merely showed a *sale*, but not a *purchase*. And this view was sustained by the court below. The Supreme Court of the United States reversed the decision, on the ground that the memorandum which showed the sale, necessarily showed the purchase, as there could not be the one without the other.[6]

As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither ac-

[1] 1 M. & S. 557.

[2] See Mason *v.* Pritchard, 12 East, 227; Oxley *v.* Young, 2 H. Bl. 613; Jackson *v.* Galloway, 5 Bing. N. C. 75; Nichols *v.* Raynbred, Hob. 88 *b*; Tucker *v.* Woods, 12 Johns. 190, 192; Reep *v.* Goodrich, 12 Johns. 397.

[3] 13 Ohio St. 84.

[4] 1 M. & S. 71, 76.

[5] See Kennaway *v.* Treleaven, 5 M. & W. 501; Charlewood *v.* The Duke of Bedford, 1 Atk. 497; Sparks *v.* Marshall, 2 Bing. N. C. 761, 775; Boston & Maine R. R. Co. *v.* Bartlett, 3 Cush. 224; Connecticut, &c. R. R. Co. *v.* Bailey, 24 Vt. 478; Cumberland Valley Ry. *v.* Baab, 9 Watts, 458; Henderson & Nashville Ry. *v.* Leavett, 16 B. Mon. 358.

[6] Butler *v.* Thompson, 92 U. S. 412. In this case the sellers and purchasers, in effect as such, are both expressly named, as they were not in many cases which have been held binding; and being a *sale to the defendants*, as admitted by the signature of their agents, it was absurd to contend that this did not show a *purchase by them*. See Radford *v.* Newell, L. R. 3 C. P. 52, where a memorandum entirely lacking in the very clear features of the memorandum in Butler *v.* Thompson was sustained.

cepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it.[1] If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made.[2]

These principles were applied in Minneapolis & St. Louis Ry. *v.* Columbus Rolling Mill.[3] On December 5, 1879, the plaintiffs wrote the defendants for quotation of price of 2000 to 5000 tons of iron rails, for March, 1880 delivery. On December 8, the defendants answered, quoting price for 2000 to 5000 tons, adding, "If our offer is accepted, shall expect to be notified of same prior to Dec. 20, 1879." On December 16, the plaintiffs telegraphed and wrote an order for 1200 tons, "as *per* your favor of the 8th. Please reply." On the 18th, the defendants telegraphed answer, "We cannot book your order at present at that price." On the 19th, the plaintiffs telegraphed, "Please enter an order for 2000 tons rails, as *per* your letter of the 8th. Please forward written contract. Reply." And again telegraphed on the 22d, "Did you enter our order for 2000 tons rails as *per* our telegram of December 19? Answer." After repeated similar inquiries by the plaintiffs, the defendants on Jan. 19, 1880, denied the existence of any contract between the parties. The court held, that the defendants' offer, while it remained open, without having been rejected by the plaintiffs or revoked by the defendants, would authorize the plaintiffs to take, at their election, any number of tons, not less than 2000, nor more than 5000, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiffs at any time before December 20. The plaintiffs, instead of accepting the offer made, on December 16, by telegram and letter, referring to the defendants' letter of December 8, directed the defendants to enter an order for 1200 tons on the

[1] Eliason *v.* Henshaw, 4 Wheat. 225; Carr *v.* Duval, 14 Pet. 77; National Bank *v.* Hall, 101 U. S. 43, 50; Hyde *v.* Wrench, 3 Beav. 334; Fox *v.* Turner, 1 Brad. App. 153.

[2] Boston & Maine R. R. *v.* Bartlett, 3 Cush. 224; Dickinson *v.* Dodds, 2 Ch. D. 463.

[3] 119 U. S. 149.

same terms. The mention in both telegram and letter of the date and the terms of the defendants' original offer, showed that the plaintiffs' order was not an independent proposal, but was an answer to the defendants' offer, a qualified acceptance of that offer, varying the number of tons, and therefore, in law was a rejection of the offer. On December 18, the defendants having, by telegram, declined to fulfil the plaintiffs' order, the negotiation between the parties was closed, and the plaintiffs could not afterwards fall back on the defendants' original offer. The plaintiffs' attempt to do so, by the telegram of December 19, was, therefore, ineffectual, and created no rights against the defendants.[1]

But, although the statute does not require, that, to make a contract binding on the party to be charged, the note or memorandum in writing must be signed by both of the parties to the contract, but only by the party or parties to be charged; yet, as the note or memorandum in writing must be of the contract, bargain, or agreement, it must, to satisfy the statute, show on its face, or by other sufficient writing connected therewith, as an essential part of such bargain, contract, or agreement, who the parties to it are. The leading case on this subject is Champion *v.* Plummer.[2] In this case there was a note or memorandum in writing, signed by the defendant, showing the sale, by the defendant, of twenty puncheons of treacle, but the name of the plaintiffs, the purchasers, did not appear in the writing. Lord Mansfield nonsuited the

[1] See Hussey *v.* Horne Payne, 4 App. Cas. 311; Ridgway *v.* Wharton, 6 H. L. Cas. 338; Rummens *v.* Robins, 3 De G. J. & S. 88; Winn *v.* Bull, 7 Ch. Div. 29; Rossiter *v.* Miller, 3 App. Cas. 238; Bonnewell *v.* Jenkins, 8 Ch. Div. 70; Jervis *v.* Berridge, L. R. 8 Ch. 360. The plaintiff, wishing to sell a medical practice with the lease of the house where it was carried on, placed it on the books of a medical agent. This led to negotiations with the defendant. The premiums asked for the practice and for the lease were stated in a letter from the agent to the defendant, but no time for completing the purchase was mentioned. The defendant replied in a letter to the agent, accepting the terms offered, and adding that he should be ready to pay the deposit money "on receipt of corrected agreement," and, at the same time, he wrote to the plaintiff personally, also accepting the terms offered, and adding: "I shall trust to you to give me the best introduction you can during three months, and afterwards if necessary." The plaintiff replied, thanking the defendant for acceding to his terms, and saying that "it would be his aim as well as his duty to give him an effectual introduction to his patients." A formal agreement was drawn up, but never signed; and, after some further correspondence, the defendant refused to complete the purchase. It was held, affirming the decision of Bacon, V. C., that, inasmuch as the time for the commencement of the purchase was left uncertain, and the stipulation as to the three months' introduction was not agreed to, and as the parties contemplated a formal agreement, there was no binding contract completed between the parties, and the action was dismissed. The *quære* was also raised as to whether, with such matters as introductions involved, the court could enforce specific performance of a contract to sell a medical practice. *Per* Jessel, M. R.: "I cannot see my way to making a decree for specific performance of an agreement to purchase a medical practice. What can the court order the seller to do?" May *v.* Thompson, 20 Ch. D. 705, 715.

[2] Before Mansfield, C. J., at *nisi prius*, 5 Esp. 240; s. c. *in bank*, 1 B. & P. N. R. 252.

plaintiffs. The full court sustained the nonsuit, holding that the writing was not a note or memorandum of a contract.[1]

In Laythoarp *v.* Bryant,[2] which was a sale by auction, the defendant signed a memorandum on the back of a paper containing the particulars and conditions of sale, in which it appeared that the sale was by auction, by Thomas Ross, by order of W. Laythoarp, the proprietor. It was objected that the name of the vendor did not sufficiently appear in the note of the contract. But the court held that it did. Tindal, C. J., said: "I admit that an agreement is not perfect unless in the body of it, or by necessary inference, it contain the names of the two contracting parties, the subject-matter of the contract, the consideration, and the promise. Looking at this contract, as it may be collected from the particular of sale, it appears to be an agreement by which Ross sells property on behalf of Laythoarp. When, in the outset, it says that property will be sold, subject to conditions, we are referred to the conditions in the same paper; and there we see that Ross is an auctioneer who sells for Laythoarp. That gets rid of the objection, therefore, that Laythoarp's name is not contained in the contract."

In Jacob *v.* Kirk,[3] the doctrine of Champion *v.* Plummer[4] was followed, Parke, B., holding, that a memorandum of sale of goods in the vendor's book, signed by the vendee in initials, the vendor's name not appearing in the book, is insufficient to satisfy the statute; and that the defect is not cured by a letter from the vendee, in which the vendor's name does appear, unless the letter clearly refers to the memorandum.

In Wheeler *v.* Collier,[5] the memorandum, signed by the purchaser, did not name the vendor, and it was held that the statute was not satisfied.[6]

In Nichols *v.* Johnson,[7] the rule is laid down: The note or memorandum of sale required by the statute must state the contract with such certainty, that its essentials can be known from the memorandum itself, without the aid of parol proof, or by a

[1] Lord Mansfield said, in delivering the judgment of the court: "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note, it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiffs. There cannot be a contract without two parties, and it is customary in the course of business to state the name of the purchaser as well as of the seller in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain." Champion *v.* Plummer, 1 B. & P. N. R. 252, 254.

[2] 2 Bing. N. C. 735.

[3] 2 Moo. & Rob. 221.

[4] 1 B. & P. N. R. 252.

[5] M. & Malk. 123.

[6] See also, Warner *v.* Willington, 3 Drew. 523; Sarl *v.* Bourdillon, 1 C. B. N. S. 188; Boydell *v.* Drummond, 11 East, 142; Thomas *v.* Deering, 1 Keen, 729; Morgan *v.* Holford, 1 Sm. & G. 101; Sheid *v.* Stamps, 2 Sneed (Tenn.), 172.

[7] 10 Conn. 192, 198.

reference cor ined therein to some other writing or thing certain; and these essentials must at least consist of the subject of the sale, the terms of it, and the parties to it, so as to furnish evidence of a complete agreement. And, in this case, the memorandum was held defective because it did not disclose the name of the vendor.

In Long *v.* Millar[1] the memorandum of the sale was held defective because it did not disclose the name of the vendor; but this want was held to be supplied by a receipt signed by the vendor, and which was connected with a receipt signed by the vendee.[2]

But where the agent has misdescribed the names of his principals in the note of the contract, and the principals have subsequently recognized the contract, it was held that the principals could not avoid the contract, where no injury, such as the loss of the benefit of a set-off, had resulted to them from the misdescription.[3] And where an auctioneer had signed the purchaser's initials to a note of the sale, Lord Ellenborough held that the purchaser's subsequent letter recognizing the sale, coupled with the note of the sale, satisfied the statute.[4]

The question came before the Privy Council in Williams *v.* Byrnes.[5] There it was held, that the provisions of the Statute of Frauds are not satisfied unless the existence of a bargain or contract appears evidenced in the writing, and a bargain or contract cannot so appear unless the parties to it are specified, either nominally, or by description or reference. Here, the defendant's testator, J., gave to one H., for the purpose of being given to the plaintiffs, a note in writing signed by J., as follows: "I will furnish Mr. H. with funds for the purchase of a steam-engine and machinery for a flour mill, on his suiting himself with the same, and notifying the purchase to me." H. gave the instrument to the plaintiffs, who, on the basis of it, agreed to and did furnish him with the steam-engine. J. was notified thereof. In an action against the executors of J. for the price, a verdict was entered for the plaintiffs; the points of law being reserved for the full court, which being equally divided, the verdict was sustained. On appeal to the Judicial Committee of the Privy Council, the decision was reversed. The case was distinguished from that of the promise in writing, signed by one, to pay any one unnamed, who shall furnish goods to the writer, or to a third person making default,

[1] 4 C. P. Div. 450.

[2] See Jones *v.* Ashburnham, 4 East, 455, 466, *et seq.*; Schneider *v.* Norris, 2 M. & S. 286; Ramsbottom *v.* Mortley, 2 M. & S. 445, *per* Dampier, J.; Saunderson *v.* Jackson, 2 B. & P. 238; Sarl *v.* Bourdillon, 1 C. B. N. S. 187; Coles *v.* Trecothick, 9 Ves. 234; Williams *v.* Jordan, 6 Ch. Div. 517.

[3] Mitchell *v.* Lapage, Holt, 253.

[4] Phillimore *v.* Barry, 1 Camp. 513.

[5] 9 Jur. N. S. 363.

which will become a binding contract with any one, whosoever he may be, who shall accept the promise in writing and furnish the goods.[1]

In this case it will be noticed that the writing was delivered by the signer of it for the purpose of being given to and acted upon by the plaintiffs. But this was held to make no difference, as the note or memorandum in writing was insufficient to satisfy the statute.[2]

But in Williams *v.* Lake[3] the writing, which was unaddressed, was given to another person than the one for whom it was intended; and, on the same principle on which Williams *v.* Byrnes[4] and the other cases above cited were decided, viz., that it was not a note or memorandum of a contract, it was held that the signer was not liable.

There, the defendant wrote and signed the following note: "Sir, — I beg to inform you that I shall see you paid to the sum of £800, for the ensuing building which you undertake to build for T. & O. of C." He intended the note to be given to one J.,

[1] The following, on the point we are considering, is the gist of the judgment: "In the present case, the name of the person with whom the contract was to be made does not appear in the instrument, nor on any other paper connected with it, and capable of being considered as completing with it a note or memorandum of the transaction. Whether this instrument is to be considered as evidence of the contract, or only of a proposal which would become a contract upon the acceptance of it by the plaintiffs, the question is still the same, whether, without the insertion of their names in it, or in some other paper connected with it, there is a sufficient note or memorandum in writing of the bargain to satisfy the statute? Apart from authority, and looking only to the words of the enactment, and the mischiefs which it was intended to prevent, their lordships think the question must be answered in the negative. The words require a written note of a bargain or contract, the statute clearly making no distinction between these two words. This language cannot be satisfied, unless the existence of a bargain or contract appear evidenced in writing; and a bargain or contract cannot so appear, unless the parties to it are specified, either nominally, or by description or reference. It is true that the statute does not require the whole bargain, in all its terms, to be stated. It stipulates only for a note or memorandum of it, signed by the party to be charged; but it does, in effect, require that the essentials, *i. e.*, all those things without which it can be no bargain at all, shall be. Upon this principle it was that the courts determined, under the 4th section, that the consideration of an agreement must appear on the face of the memorandum of agreement, or be matter of necessary implication from its language. It was obviously the intent of the statute to prevent, as far as it could conveniently, the mischief of being obliged to have recourse to oral evidence in regard to the transactions within it. But it would fail to accomplish its object in a most material particular, and in one in which its requirements might always be most easily satisfied, if it did not impose the necessity of stating the name of the seller as well as of the buyer; of the party by whom goods were to be supplied, as well as of him to whom they were to be supplied, under the 17th section; or of the party to be guaranteed as well as of him who is to guarantee under the 4th. Unless this be done, oral evidence must be had recourse to, and the risk incurred, that a party may be sued by one with whom he had never intended to have any transaction, — a matter of the greatest importance under many supposable circumstances."

[2] Williams *v.* Jordan, 6 Ch. Div. 517; Boyce *v.* Green, Batty (Irish), 608, are to the same effect. And see Warner *v.* Willington, 3 Drew. 523; Potter *v.* Duffield, L. R. 18 Eq. 4; Rossiter *v.* Miller, 5 Ch. Div. 648; Catling *v.* King, 5 Ch. Div. 660; Dolling *v.* Evans, 36 L. J. Ch. 474.

[3] 29 L. J. Q. B. 1.

[4] 9 Jur. N. S. 363.

who had contracted to build some houses for T. & O., but the contract having fallen through, T. & O. afterwards agreed with the plaintiff to build for them, and O. handed to him the guaranty of the defendant, although he had no authority from the defendant to do so. The court held, as was held in Williams *v.* Byrnes[1] and by Lord Mansfield in Champion *v.* Plummer,[2] that to constitute an agreement, the name of each contracting party must appear by the writing, and that the document did not satisfy the statute, as it did not contain the name of the plaintiff. So in Allen *v.* Bennet,[3] where the seller's agent wrote, in the purchaser's book, a note of a sale by the defendants, signed by their agent, but in which the plaintiff's name did not appear, it was held, of itself, to be insufficient to satisfy the statute. But where the defendant wrote his name in the order book of the plaintiffs, which had the words "Order Book," printed outside, and the names of the plaintiffs on the fly-leaf at the beginning, it was held that the names of both the parties to the contract sufficiently appeared.

In Williams *v.* Byrnes,[4] the case was distinguished from that of the liability of a party who advertises generally a reward for information to any one not named in the advertisement, who shall first give the information asked for, in which case the liability is at common law, and not a contract within the Statute of Frauds. On the same principle the liability of one advertising for tenders for the furnishing of goods would seem to be a common-law liability, and not within the statute.[5] In Williams *v.* Byrnes,[6] the Privy Council say, that they do not doubt that such a promise as was made in that case will be binding on the party who has signed the writing. The law was, apparently, so decided in a *nisi prius* case in England, by Gaselee, J.,[7] where it was held that a guaranty for goods addressed to one of two partners may be declared on as given to both, if it appear that the partner to whom it was addressed did not carry on any separate business; and that a guaranty not addressed to any one would enure to the benefit of those to whom, or for whose use, it was delivered. This case is only consistent with the holding in Champion *v.* Plummer,[8] Williams *v.* Byrnes,[9] and the other cases above cited, on the assumption that the guaranty was intended to be binding in favor of any one, unnamed, who might supply the goods.

We find this principle, in effect, alluded to in an old case (A. D. 1806) in the Supreme Court of the United States,[10] Chief Justice

[1] 9 Jur. N. S. 363.
[2] 1 B. & P. N. R. 252.
[3] 3 Taunt. 169.
[4] 9 Jur. N. S. 363.
[5] See cases on this point, cited *infra*.
[6] 9 Jur. N. S. 363, 365.
[7] Walton *v.* Dodson, 3 C. & P. 162.
[8] 5 Esp. 240.
[9] 9 Jur. N. S. 363.
[10] Lawrason *v.* Mason, 3 Cranch, 492.

Marshall delivering the judgment. In this case the guaranty was as follows: "Alexandria, 28th Nov., 1800. Mr. James McPherson: Dear Sir,—We will become your security for 130 barrels of corn, payable in twelve months. Lawrason & Smoot." The plaintiff, Mason, furnished the corn to McPherson, who failed to pay for it. Lawrason, the surviving member of the firm of guarantors, was then called upon for payment, and refusing to pay, an action against him, on the guaranty, was brought. He demurred to the declaration, on the ground that the guaranty did not show a contract between him and Mason. The Circuit Court gave judgment on the demurrer in favor of the plaintiff, which was affirmed by the United States Supreme Court.

Both the head-note of the case, and the ground upon which the decision is placed, by Marshall, C. J., accord with the *dictum* of the Privy Council in Williams *v.* Byrnes.[1] The head-note is: "A letter from the defendants to J. M. saying that they would be his security for 130 barrels of corn, payable in twelve months, will maintain an action of assumpsit against the defendants by any person who, upon the faith of the letter, shall have given credit to J. M. for the corn." And Marshall, C. J., says: "In the present case there is an actual assumpsit *to all the world, and any person who trusts, in consequence of that promise, has a right of action.*"

This thoroughly accords with what is said by the Privy Council in Williams *v.* Byrnes:[2] "Their lordships do not doubt that a promise in writing, signed to pay any one unnamed, who shall furnish goods to the writer or to a third person, making default, will become a binding contract with any one, whosoever he may be, who shall accept the promise in writing and furnish the goods." But, the Privy Council, considering the effect of the Statute of Frauds, — no question with reference to which was raised or considered in Lawrason *v.* Mason,[3] — add: "But in such case the requisition of the statute will have been complied with." That is, in the case they put, and, in effect, in the case as stated in the above extract by Chief Justice Marshall, *the whole contract* appears in the writing, *i. e.*, a contract to pay *any one* who may supply the goods; and, therefore, the statute requiring written evidence of the whole contract is satisfied.

But, as it was, both in Williams *v.* Byrnes[4] and in Lawrason *v.* Mason,[5] a contract not with "all the world," under which "any person who trusts, in consequence of that promise, has a right of action;" but, as it was in both of these cases, and alike in them, a verbal contract between the plaintiff and the defendant, to answer

[1] 9 Jur. N. S. 363.
[2] *Ibid*, at p. 365.
[3] 3 Cranch, 492.
[4] 9 Jur. N. S. 363.
[5] 3 Cranch, 492.

for the debt, default, or miscarriage of another; the writing, in neither of these cases, was a note or memorandum of the whole contract, or of all its essential parts, and hence in neither of them was the statute satisfied.

The former case is an express decision on the point, and the latter, although in it the consideration of the statute was improperly ignored, is put upon the exceptional ground stated by the Privy Council, as being a contract with any one, and thus, on its face, showing that it was so in fact. The error in the case is that it was not a contract with any one unnamed, but with the plaintiff alone, and hence was fatally defective under the Statute of Frauds, had that point been taken in the case.

In the Supreme Court of South Carolina, however, there is a case decided under the Statute of Frauds, where the guaranty came within the language we have quoted from the Privy Council in Williams *v.* Byrnes,[1] and from the judgment of the Supreme Court of the United States, in Lawrason *v.* Mason.[2]

In Griffin *v.* Rembert[3] the guaranty, signed by the defendant, was as follows: "Sumter, S. C., Oct. 15, 1866. Mr. Francis E. Joye,— Dear Sir: As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guarantee the payment of any bills which you may make, under this letter of credit, in Baltimore, not exceeding in the whole amount $1500." In an action against the guarantors by a party who supplied a portion of the goods under the guaranty, the case was properly decided, in accordance with the *dictum* of the Privy Council in Williams *v.* Byrnes,[4] and agreeable to the language of Marshall, C.J., in Lawrason *v.* Mason,[5] as a contract with any one unnamed who might supply the goods. But, while the decision itself is right, the ground of the decision is entirely untenable. It helps still further to show the unsoundness of those cases which, confounding mutuality with consideration, profess to hold that a note or memorandum in writing, which omits one-half of the contract, is what the statute requires, viz., a note or memorandum of the contract, bargain, or agreement, *i. e.*, of the *whole* contract, bargain, or agreement.

The court, in Griffin *v.* Rembert,[6] acting on the fallacy that the "consideration" need not appear by the writing, go one step further, and say that, in contracts under the statute it is not necessary that the parties to the contract should be shown by the writing; that "the statute is fulfilled if the party against whom the performance is sought has signed the letter."

[1] 9 Jur. N. S. at p. 365.
[2] 3 Cranch, at p. 496.
[3] 2 S. C. 410.
[4] 9 Jur. N. S. at p. 365.
[5] 3 Cranch, at p. 496.
[6] 2 S. C. at p. 414, *et seq.*

Their language, in full, is: "The argument used here to convince the court that the guaranty is void because 'the plaintiffs are not named in the letter,' *is of the same character as that which enforced the necessity of the statement of the consideration in the instrument itself.* It proceeded upon the ground that the word 'agreement,' as used in the statute, was employed in a technical sense; that *the consideration being an essential and a vital element in an agreement, and as the statute requires the latter to be in writing, all that necessarily form component parts of it must be stated.* [This would seem to be quite self-evident.] So here it is contended, that an agreement implies the assent of two or more minds, and, therefore, the contracting parties should be named. It is not necessary to follow the argument by which the courts of this, and some other of the States of the Union, have felt themselves impelled to a contrary conclusion. It may be enough to say, that *the statute merely requires that a note or memorandum of the agreement shall be in writing* [the italics are ours], and signed by the party to be charged therewith, or some other person by him lawfully authorized. *Following the analogy of the decision made on the other question arising under the word 'agreement,' we hold that the statute is fulfilled if the party against whom the performance is sought has signed the letter.*"

Thus, they first eliminate one entire side of the contract, bargain, or agreement (the terms are simply interchangeable); then, on analogy, they do away with the necessity of naming the parties in the writing; all that is then left are the one side of the contract, and one signature. If, on principle, they can eliminate one side of the contract, and do away with the necessity of showing, by the writing, who even the parties to the so-called "contract," "bargain," or "agreement" are; as logically, and consistently, and as analogously, they may sweep away the other side of the subject of the "contract," as well; and, then, all that is left is the blank signature of the party to be charged, which, *literally*, the South Carolina court say is sufficient: "We hold that the statute is fulfilled *if the party against whom the performance is sought has signed the letter.*" Simply that! But what "letter" there would be to sign, if the signature alone of "the party against whom the performance is sought" satisfies the statute, is not clear.

Of course, they don't mean that. But they mean it as much as Tindal, C. J., in Laythoarp *v.* Bryant,[1] meant that a memorandum in writing, by which the names of the parties to the contract did not appear, satisfies the statute, when, in that case, he says: "The word "agreement," therefore, is satisfied, if the writing states the

[1] 2 Bing. N. C. 735, 744.

subject-matter of the contract, the consideration, and is signed by the party to be charged." What the court was dealing with there was the question, simply, whether, *in addition* to the subject-matter of the contract, the consideration, the names of the parties contracting, and the signature of the party whom it was sought to charge, it was also necessary that the mutuality should be shown by the writing, by both of the parties to it signing it; and they held that it was not, that the statute did not require that. But all the other questions had been long before decided by such cases as Allen *v.* Bennet,[1] and Champion *v.* Plummer;[2] in the latter of which Lord Mansfield, on the point we are considering, said: "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties?"

And, yet, it is the language of Tindal, C. J., in Laythoarp *v.* Bryant,[3] which we have quoted above, upon which the Supreme Court of South Carolina, in Griffin *v.* Rembert,[4] largely rely, in holding that the names of the contracting parties are not required under the statute to be shown by the writing.

For that position they quote an old American work, by Pitman, on Principal and Surety,[5] where the language we have quoted is stated in the text: "*Per* Tindal, C. J., in Laythoarp *v.* Bryant, 2 Bing. N. C. 735," being cited as the authority.

But as, on the authority on which the South Carolina Court rely, the consideration is shown to be essential in the writing; if they accept the authority, as it holds that the consideration must appear, on their own doctrine of analogy equally so must the names of the contracting parties, or else the essential element of who the parties to the contract are, is not, of course, evidenced by the writing; and, therefore, the requirements of the statute, of a note or memorandum in writing of the contract, bargain, or agreement, *i. e.*, of all the essential parts of it, are not satisfied.

But in Laythoarp *v.* Bryant,[6] the writing signed by the defendant showed that the sale was at auction, by Mr. Thomas Ross, "by order of Mr. W. Laythoarp, *the proprietor*," and *it was expressly held in Laythoarp* v. *Bryant*[7] *that the names of the parties to the contract must appear by the writing;* and that, in that case, they did sufficiently appear.

The case came before the court on two objections; *first*, that "the contract," when inspected, did not contain the name of one of the parties; *second*, that "the contract" had not been signed by the vendor, but by the vendee only. It was in discussing the

[1] 3 Taunt. 169.
[2] 1 B. & P. N. R. 254.
[3] 2 Bing. N. C. at p. 744.
[4] 2 S. C. 410, 415.
[5] P. 75.
[6] 2 Bing. N. C. 735.
[7] 2 Bing. N. C. 735, 742.

latter of these two points, that Tindal, C. J., used the language quoted by Pitman, and which is requoted by the South Carolina Court; and by which, and by some other authorities, they were misled into unsoundly holding the general doctrine that in the writing under the statute it is not necessary that it should appear who both of the parties to the contract are.

That matter[1] was summarily dealt with by Tindal, C. J., in disposing of the first point, where he says: "I admit that an agreement is not perfect unless in the body of it, or by necessary inference, *it contain the names of the two contracting parties*, the subject-matter of the contract, the consideration, and the promise. Looking at this contract, as it may be collected from the particular of sale, it appears to be an agreement by which Ross sells property on behalf of Laythoarp. When, in the outset, it says that the property will be sold, subject to conditions, we are referred to the conditions in the same paper; and there we see that Ross is an auctioneer who sells for Laythoarp. That gets rid of the objection, therefore, that Laythoarp's name is not contained in the contract," and deprives Pitman on Principal and Surety, p. 75, and "*Per* Tindal, C. J., in Laythoarp *v.* Bryant, 2 Bing. N. C. 735," of any weight as authority for the ostensible holding of the Supreme Court of South Carolina, in Griffin *v.* Rembert.[2]

Parsons on Contracts[3] and Kent's Commentaries[4] are also cited by the court to sustain their position that in agreements, generally, the names of the contracting parties do not, under the statute, have to be shown by the writing. But the language quoted by the court from both of these leading American writers is simply to the effect, as in Laythoarp *v.* Bryant,[5] that both of the parties need not sign the contract, — manifestly a very different thing from the writing, signed by the party whom it is sought to charge, not showing with whom he has contracted. Kent refers to the statute very briefly, but he does state that "unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute;"[6] which "essential terms" would clearly include what is to be given for the goods, the consideration; and, according to the South Carolina Court, "by analogy," that would imply that the names of the contracting parties must also be shown by the writing.

But Professor Parsons, who deals more fully with the statute, expressly says, that the writing "must contain the *names of the*

[1] At p. 742.
[2] 2 S. C. 410, 414, *et seq.*
[3] 2 Pars. on Con. p. 9.
[4] 2 Kent's Com. 510.
[5] 2 Bing. N. C. 735.
[6] 2 Kent's Com. 511.

parties,"[1] the italics being his own; and Champion *v.* Plummer,[2] and other authorities, English and American, are cited for this clear and unquestionably sound position. So, these authorities do not sustain the unsound *extra-judicial* holding of the South Carolina Supreme Court.

Fell on Guaranty[3] is also cited. And although the language of that author is, as quoted, sufficient to sustain the *ratio decidendi* of what we have already intimated, is, in accordance with the *dictum* of the Privy Council in Williams *v.* Byrnes,[4] the thoroughly well decided case of Griffin *v.* Rembert[5] (although not sound on the ground on which it is ostensibly decided); yet that author is as far as the others from sustaining the doctrine of the South Carolina Court, that, generally, under the Statute of Frauds, the names of both the contracting parties need not appear by the writing. On the contrary, Mr. Fell expressly says, that, "Generally speaking, it must appear upon the face of an agreement, who the contracting parties are."[6] But, on p. 67, that writer does, as he is quoted, say, "But it seems very questionable, whether a note of guaranty need show, upon the face of it, all the contracting parties. Supposing a guaranty given in the following form: 'I promise to guaranty the payment of goods to the amount of £100 furnished to A. B. (Signed) B. C.' This may be a very useful form of guaranty, where a person of known reputation wishes to gain credit for another, leaving to him the choice of such person to deal with as he might find most to his advantage."

While this is in strict accord with the *dictum* of the Privy Council, when confined to the case of a guaranty given to one to be used with unnamed parties, the authorities cited for it, Stadt *v.* Lill,[7] and Coleman *v.* Upcot,[8] do not touch the point. The former case holds that the writing was good under the fourth section; the parties to the contract, its subject-matter and consideration, being stated, and the writing being signed by the party to be charged. The latter case holds that the *aggregatio mentium* can be shown by the verbal assent to the contract, of the party who is not the party sought to be charged; all the essentials of the contract being evidenced by the writing signed by the party to be charged.

But, in a note[9] in Fell on Guaranty, the language is in very direct contradiction to that of the text, thus: "The written memorandum must contain *the names of both the contracting parties.* It

[1] 3 Pars. on Con. 13, n. *v.*
[2] 5 Esp. 240, 4 B. & P. 253.
[3] Page 67.
[4] 9 Jur. N. S. at p. 365.
[5] 2 S. C. 410.
[6] At p. 66.
[7] 9 East, 348.
[8] 5 Vin. Ab. 527.
[9] To p. 67; A., appendix, 492; 3d Am. ed.

is not sufficient that a guaranty contain the name of the party who is answerable for the debt; it must contain as well the name of him whose debt is to be answered for."[1]

The case of Union Bank *v.* Coster's Executors,[2] in the New York Court of Appeals, is another case where the decision accords with the *dictum* of the Privy Council in Williams *v.* Byrnes.[3] In that case H. & C. gave K. & D. a letter, unaddressed, to be used as the holders might find necessary, as follows: "New York, May 29, 1841. Sir: We hereby agree to accept and pay at maturity any draft or drafts on us at sixty days' sight, issued by K. & D. of your city, to the extent of $25,000, and negotiated through your bank. (Signed) H. & C." At the foot of the letter of credit was a guaranty executed at the same time by the defendant's testator, as follows: "I hereby guarantee the due acceptance and payment of any draft issued in pursuance of the above credit. (Signed) John G. Coster."

On the faith of this letter of credit and guaranty, the plaintiffs purchased from K. & D. drafts for $9000, and, subsequently, a further draft for $4000, on H. & C., at sixty days' sight. The former were duly accepted and paid, but the latter was refused acceptance. Independent of these drafts, another bank had purchased a draft for $10,000 under the same letter and guaranty.

In an action against the executors of the guarantor, a verdict was entered for the plaintiffs, which was sustained by the New York Superior Court.[4] On appeal the judgment was sustained. One of the grounds upon which the appellants relied was, that the guaranty was void under the Statute of Frauds, because it did not contain any name or description of the person or party to whom the promise to answer for the debt or default of another was made.[5] But the Court of Appeal held that, the guaranty being general, a contract arose between the guarantor and any party or parties acting under the guaranty.[6]

[1] This, which seems to be an American note, is a little mixed; but as the contracting parties are the guarantor and the guarantee, and as there is cited in the note, among other cases, Williams *v.* Lake, 1 L. T. N. S. 57, stated by us *supra*, it manifestly means that which in the first part of the sentence it says, namely, that "the written memorandum (*i. e.*, of the guaranty named and referred to on page 67) must contain the names of both the contracting parties."

[2] 3 Comst. 203.

[3] 9 Jur. N. S. 365.

[4] Union Bank *v.* Coster's Executors, 1 Sandf. 562.

[5] For this, Davis *v.* Shields, 26 Wend. 350; Parker *v.* Wilson, 15 Wend. 343, '6 & '7; Manrow *v.* Dunham, 3 Hill, 584; Parker *v.* Bradley, 2 Hill, 584; Hunt *v.* Brown, 5 Hill, 145; Rogers *v.* Kneeland, 13 Wend. 114; Newcomb *v.* Clark, 1 Denio, 226, were cited.

[6] Pratt, J., in delivering the judgment of the court, said: "But these general letters of credit may be subdivided into two kinds, those that contemplate a single transaction, and those that contemplate an open and continued credit, embracing several transactions. In the latter case they are not generally confined to transactions with a single individual, but if the nature of the business which the letter of credit was intended to facilitate requires

In Birckhead *v.* Brown,[1] where a letter of credit was addressed to specified parties, and advances were made on it by other parties, the New York Supreme Court, in holding that an action by these would not lie for want of privity of contract, thus well stated the general law applicable to the question we are considering: "Letters of credit usually contain a request that some one will advance money or sell goods to a third person, and an undertaking on the part of the writer that the debt which may be contracted by the third person in pursuance of the request shall be duly paid. These letters have been divided into two classes, general and special. They are general when addressed to any person and all persons, without naming any one in particular. They are special when addressed to a particular individual or firm by name. When the letter is addressed to all persons, it is in effect a request made to each and every one of them, and any individual may accept and act upon the proposition contained in it, and on his doing so, that which was before indefinite and at large becomes definite and fixed; a contract immediately springs up between the person making the advance and the writer of the letter, and it is thenceforward the same thing in legal effect as though the name of the former had been inserted in the letter at the beginning. When the letter is special, or in other words, addressed to a particular individual, he alone has the right to act upon and acquire rights under it. If any one else attempts to accept and act upon the proposition contained in the letter, he comes in as a mere volunteer, and he cannot by thus thrusting himself forward create any legal obligation on the part of the writer. There has been no communication, and is no privity of contract between them." [2]

The conclusions we reach on the general subject we have been considering, are,—

it, different individuals are authorized to make advances upon it, and it then becomes a several contract with each individual to the amount advanced by him."

[1] 5 Hill, 634, 642.

[2] So in Russell *v.* Wiggin, 2 Story, 213, 233, Story, J., says: "Take the case of a common letter of guaranty, where the guarantor says in general terms in a paper addressed to A. B., the party for whose benefit it is given, 'I hereby guarantee to any person, advancing money or selling goods to A. B., not exceeding £100, the payment thereof at the expiration of the credit which shall be given therefor.' Can there be a doubt that any person making the advances or selling the goods upon the faith of the letter, is entitled to treat the paper as containing a direct and immediate promise to himself to guaranty the payment, notwithstanding it is addressed to A. B.? In the commercial world, as far as I know, no doubt has as yet ever been entertained on this subject; and yet transactions of this sort are of every day's occurrence, especially where the person by whom the advance is to be made, is uncertain or unknown. The case of Adams *v.* Jones, 12 Pet. 207, 215, is in point to show that such a guaranty, in such general terms, will bind the guarantor in favor of any person who shall trust the party upon the faith and credit of the guaranty." And see Watson's Exors. *v.* McLaren, 19 Wend. 557; 26 Wend. 425; Boyce *v.* Edwards, 4 Wheat. 111; Bradley *v.* Cary, 8 Greenl. 234; Carnegie *v.* Morrison, 2 Metc. 381.

On the analogous question at common

1. That in all such cases as Williams *v.* Byrnes,[1] Lawrason *v.* Mason,[2] Williams *v.* Lake,[3] Williams *v.* Jordan,[4] and Boyce *v.* Green,[5] where the guaranty is to a specific person, as the words of the statute require a note in writing of the bargain or contract, the language cannot be satisfied unless the existence of the bargain or contract appear evidenced in writing, and a bargain or contract cannot so appear, unless the parties to it are specified, either nominally, or by description or reference. But,—

2. In such cases as Griffin *v.* Rembert,[6] and Union Bank *v.* Coster's Executors,[7] where there is a promise in writing, signed by the party to be charged, to pay any one unnamed who shall furnish goods to the writer, or to a third person making default, the promise in writing will become a binding contract with any one, whosoever he may be, who shall accept the promise in writing, and furnish the goods; the requisition of the statute being there complied with, as the note in writing is a note or memorandum of the contract, outside of the question of mutuality, which latter does not have to be evidenced by the writing.

But it is not absolutely essential that the actual names of the parties to the contract should appear by the writing. If the writing contain a sufficient description of the parties, that has been held to be sufficient. In Hood *v.* Lord Barrington,[8] a sale of property described as belonging to the late Admiral Ferguson, expressed to be "by direction of the executors," was held a sufficient description of the vendors, without naming who the executors were. So, in Sale *v.* Lambert,[9] where the memorandum showed that the sale was "by direction of the proprietor," but did not contain the name or any other description of the vendor, it was held that the description of the vendor was sufficient. And in Commins *v.* Scott,[10] where the particulars annexed to the memorandum of the sale showed that the vendors were a company in possession of the premises, it was held that this was a sufficient description of them.[11] In Rossiter *v.* Miller,[12] too, it was held that

law referred to by the Privy Council in Williams *v.* Byrnes, 9 Jur. N. S. 363, 365, as to the liability of any one who advertises generally a reward for information to any person not named in the advertisement, who shall first give the information asked for, see Williams *v.* Carwardine, 5 C. & P. 566; Lancaster *v.* Walsh, 4 M. & W. 16; City Bank *v.* Bangs, 2 Edwards (N. Y.), Ch. 95; Fallick *v.* Barber, 1 M. & Sel. 108.

[1] 9 Jur. N. S. 363.
[2] 3 Cranch, 492.
[3] 29 L. J. Q. B. 1.
[4] 6 Ch. Div. 517.
[5] Batty (Ir.), 608.
[6] 2 S. Car. 410.
[7] 3 Comst. (N. Y.) 203.
[8] L. R. 6 Eq. 218.
[9] L. R. 18 Eq. 1.
[10] L. R. 20 Eq. 11.
[11] And see Morris *v.* Wilson, 5 Jur. N. S. 168; Trueman *v.* Loder, 11 A. & E. 589; Newell *v.* Radford, L. R. 3 C. P. 52; Calder *v.* Dobell, L. R. 6 C. P. 486; Thomas *v.* Brown, 1 Q. B. Div. 714; Beer *v.* London & Paris Hotel Co., L. R. 20 Eq. 412.
[12] 5 Ch. Div. 648; 3 App. Cas. 1124.

the term "proprietors" was a sufficient description from which to identify the vendors. And in Catling *v.* King,[1] where the vendor was described as "a trustee selling under a trust for sale," the description of the vendor was held sufficient. But, in Potter *v.* Duffield,[2] it was held that the term "vendor" alone was insufficient, as it contains no description of who the vendor is.[3]

[1] 5 Ch. Div. 660.

[2] L. R. 18 Eq. 4.

[3] In Catling *v.* King, 5 Ch. Div. 660, 665, where it was held that "a trustee selling under a trust for sale" was a sufficient description, Mellish, L. J., said: "The statute only requires that there should be a note or memorandum of a contract. Then the cases no doubt show (what, even if not established by authority, would have been clear enough) that you must be able to discover from the written document who the vendor is. If he is left quite at large as 'vendor,' or as 'my client,' or something of that kind, that is too vague. In determining whether the description in the present case is sufficient or not, the only thing to look at is whether it is within the meaning of the statute; whether it is so vague that persons who have not contracted could by perjury be made liable on the contract. I cannot see that such a description as this exposes parties to that risk any more than if the name was mentioned and the question was raised which of the persons bearing that name was intended. It appears to me that if a man is described as a trustee for sale of certain property, he must be so by virtue of some written document, and the production of the document making him a trustee for sale of the property in question, identifies him." The same principles are laid down by Lord Cairns in the House of Lords, in Rossiter *v.* Miller, 3 App. Cas. 1124, 1140, thus: "As to the case of the term 'proprietors,' I own I was somewhat surprised to hear that question argued, for I am sure your lordships have frequently seen conditions of sale, not merely by auction, but by private contract, in which it is stated that the sale is made sometimes by the owner and sometimes by the mortgagees, and a form of contract is annexed in which an agent signs for the vendors, and no other specification upon the vendor's part is inserted, and I never heard up to this time that a contract under those circumstances was invalid. In point of fact, the question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest?* If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, — in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the statute of frauds. But if I, being really an agent, enter into a contract to sell Blackacre, of which I am not proprietor, or to sell the house No. 1 Portland Place, on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the statute of frauds can arise; and I should be surprised if any authority could be found, and certain none has been produced, to say that a contract under those circumstances would not be valid."

The same question was dealt with in the English Court of Appeal in Donnison *v.* The People's Café Co., 45 L. T. N. S. 187, where, reversing the judgment of Malins, V. C., the court held that in that case, neither the name nor sufficient description of the vendor was given to satisfy the 4th section of the statute. The sale of the property was by auction, the auctioneer only saying: "We are instructed to dispose of property; our instructions are to sell." Jessel, M. R., on this point said: "That does not show that the person who is selling is the owner or proprietor, which is the same thing. He may be a person having a power to dispose of the property, or what is sometimes called a power simply collateral, without any interest in the property. The most familiar case is the case of a trustee with a power of sale. He may be a mortgagee or any person having any power; in fact, he may be a commissioner under an inclosure act, having power to sell the lands for payment of the waste. He does not show by anything who he is or what he is; therefore there is no description given at all. The mere word 'vendor,' will not do, because that is the somebody who sells. When you come to 'proprietor,' there is something to show it, and I do not know why 'proprietor' in many cases is not as good and better than the name of the person. An auctioneer might say: 'We sell on behalf of John Smith.' That is not such a good description as, 'We sell on behalf of the owner of Blackacre, situate so and so.' In some cases the description is better than the name. Would any one

Kay, J., in Jarrett *v.* Hunter,[1] held, on the principles established in Rossiter *v.* Miller,[2] Sale *v.* Lambert,[3] and Potter *v.* Duffield,[4] that if the vendor is described in the contract as proprietor, owner, mortgagee, or the like, the description is sufficient, although he is not named; but if he is described as vendor, or client, or friend, of a named agent, that is not sufficient; the reason being that the former description is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise; while, as to the latter, in order to find out who is vendor, client, or friend, you must go into evidence on what there might possibly, as in Potter *v.* Duffield, be a conflict, and that is exactly what the act says shall not be decided by parol evidence. The court would be thrown on parol evidence to decide who sold the estate, who was the party to the contract; the act requiring that fact to be in writing. And this applies even when the vendor signs the contract, but describes himself, in the contract, as "solicitor for the vendor;" and the fact of the purchaser knowing who the vendor is does not make the contract valid which is invalid under the statute.

Where property was sold by auction, the particulars and conditions of sale not disclosing the vendor's name, and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of sale, and, subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (the vendor himself being a member of such attorney's firm) wrote in the course of a correspondence which ensued: "*Re* S.'s purchase. We would like to close this;" and, referring to certain representations made in the advertisements of the sale, "They were not made part of the contract of sale. . . . Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter, we will prepare it at once and send you draft for approval." And, on a subsequent occasion: "*Re* S.'s purchase. Herewith please receive deed for approval." And, on another occasion, the vendor himself wrote: "I shall take immediate steps to enforce the contract." It was held by the Supreme Court of Canada, affirming the judgments of the courts below, that the conditions of sale, together with the correspondence, were sufficient to constitute a complete and per-

doubt that the words 'the queen,' or 'the prime minister,' or 'the president of the council,' would not indicate known persons? You do not want the actual baptismal and surnames; you only want a sufficient description. In every case the question of what is sufficient may be discussed, but where there is no description, as in the case before us, it is different."

[1] 34 Ch. Div. 182, 184.
[2] 3 App. Cas. 1124, 1141.
[3] L. R. 18 Eq. 1.
[4] *Ib.* 4, 8.

fect contract between the vendor and purchaser within the Statute of Frauds.[1]

And where one who was not the owner sold property without disclosing the name of the owner, and gave, in his own name, a receipt for a deposit on the purchase-money, the jury having found that he sold as principal, the court held that he was liable on his contract, under the statute, as the vendor, although the name of the owner did not appear in the writing.[2]

And though the names of the parties to the contract appear by the writing, this is not sufficient unless, by fair intendment, the names appear as of the parties to the contract, and not merely as matter of description. Thus, in Vandenburgh *v.* Spooner,[3] the memorandum signed by the defendant was as follows: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenburgh, now at the Lyme Cobb, at 1*s. per* foot;" and it was held that, as this did not show that the marble was purchased from Mr. Vandenburgh, the plaintiff, it was not sufficient; that the essentials of the contract must be collected from the document by means of a fair construction or reasonable intendment, and that the seller's name must appear as seller in the document, and not, as in this case, as a part of the description of the goods.

In Bailey *v.* Ogden[4] the defendant's agent wrote in his memorandum-book the following memorandum: "J. Ogden & Co. — Bailey & Bogert. Brown 12½, white 16¼, 60 and 90 days. Debenture part pay." In an action by the plaintiffs for the price of certain sugars alleged to be sold to the defendants, this memorandum was relied on to take the case out of the statute, but the court held that it was absolutely unintelligible; that it had not the essentials of a contract, or memorandum of a contract; that no person could ascertain from it which of the parties was the seller, and which was buyer; nor whether there was any actual sale between them, nor what specific article was the object of the sale, or in what quantity, or what was the price.

In Newell *v.* Radford[5] it was thought that Vandenburgh *v.* Spooner[6] went to the full extent of the law, and that it could be understood only on the principle that a written agreement that "A. agrees to buy B.'s horse for £10" is not sufficient to satisfy

[1] O'Donohoe *v.* Stammers, 11 S. C. of Can. R. 358.

[2] Long *v.* Millar, 4 C. P. Div. 450. And see Higgins *v.* Senior, 8 M. & W. 834; Jones *v.* Littledale, 6 A. & E. 486; Calder *v.* Dobell, L. R. 6 C. P. 486; Southwell *v.* Bowditch, 1 C. P. Div. 374; Baumann *v.* James, L. R. 3 Ch. 508.

[3] L. R. 1 Ex. 316.

[4] 3 Johns. 399.

[5] L. R. 3 C. P. 52.

[6] L. R. 1 Ex. 316.

the Statute of Frauds, because it could not be inferred by reasonable intendment from such a writing that B. was the seller. In Newell *v.* Radford the memorandum of the sale of thirty-two sacks of flour, signed by the defendant's agent, in the plaintiff's book, was: "Mr. Newell, 32 sacks culasses at 39*s.*, 280 lbs., to await orders." In an action for the non-delivery of the flour, it was held that parol evidence was admissible to show the surrounding circumstances, and that as by such evidence it appeared that the plaintiff was a baker, who would therefore require flour, and the defendant a person who was in the habit of selling it, and looking at the nature of the entry in relation to these facts, there was no reasonable doubt that it was a memorandum of a sale from the defendant to the plaintiff.[1]

The case of Leonard *v.* Vredenburgh,[2] was one of an action on a promissory note, which was guaranteed by the defendant, who wrote on the note, "I guaranty the above," and signed this memorandum. The note was made by one Johnson, in favor of the plaintiff, and delivered to him, for goods bought by the maker of the note, from the plaintiff. On the trial before Kent, C. J., evidence was offered to show that the whole transaction of the sale of the goods and the giving of the note, with the defendant's guaranty, was one entire transaction, and, therefore, as the note implied consideration, that the whole of the defendant's contract was sufficiently shown to satisfy the statute. The evidence was refused, on the ground that the defendant's undertaking, being to pay the debt of another, was within the statute, and that the consideration for his undertaking did not appear in the writing. On a motion for a new trial it was held that the evidence had been improperly rejected, as the defendant's contract having been an *original* undertaking, consisting in his undertaking to guaranty the debt of Johnson for the goods then purchased; the latter's note, being for value received, importing a consideration on its face, was all the consideration requisite to be shown, and as the memorandum disclosed that the defendant guaranteed the debt of Johnson, and being all one transaction, the value received was evidence of consideration embracing the promises both of Johnson and the defendant. The judgment of the court was delivered by Kent, C. J.,

[1] See Macdonald *v.* Longbottom, 1 E. & E. 977, 987, where parol evidence was admitted to show that "your wool" included wool bought of other farmers beside that which came from the plaintiff's own sheep; Lord Campbell, C. J., there saying: "I am of opinion that, when there is a contract for the sale of a specific subject-matter, oral evidence may be received of every fact within the knowledge of the parties before and at the time of the contract, for the purpose of showing what that subject-matter was." In Spicer *v.* Cooper, 1 Q. B. 424, parol evidence was admitted to show that the price of £5, mentioned in the memorandum, meant, by the custom of the trade, £5 *per* cwt.

[2] 8 Johns. 29.

himself, who had changed the opinion which he entertained on the trial.[1]

[1] In this case, the contract is referred to by the court as a "collateral undertaking" on the part of the guarantor. The term "collateral" is sometimes used to distinguish it from what is designated an "original" undertaking; from which it has sometimes been mistakenly inferred that a collateral undertaking and an original undertaking are, therefore, always necessarily different and distinct. The case of Leonard *v.* Vredenburgh, 8 Johns. 29, on these questions has been not a little misunderstood; and we find in some of the cases in this country the opinion expressed that that case has broken into the rule established by the English cases with reference to the construction of the statute of frauds. But we think that not only is that case thoroughly well decided, but that it is in strict harmony with the whole trend of the English cases on the subject, from Wain *v.* Warlters, 5 East, 10, down. The rules to be deduced from Leonard *v.* Vredenburgh, 8 Johns. 29, and the English cases in conjunction, are: (1) That, where a contract is made between A. and B., by which B. is, for instance, at the request of A., to furnish goods to C., there the contract is a direct contract between A. and B., and is not within the statute. (2) Where the contract is between A., B., and C., that B. is to sell goods to C., and that A. is to pay for the goods if C. do not pay for them, there, while the contract is, on the part of A., a *collateral* one, and as a contract to answer for the debt, default, or miscarriage of another, must be in writing, under the statute; the whole contract between A., B., and C. is, as it was in Leonard *v.* Vredenburgh, 8 Johns. 29; Stadt *v.* Lill, 9 East, 348, and in other cases of the same class, still one *original* and entire transaction; and if the writing show who are the parties to the contract, and what the contract is, the requirements of the statute are fully complied with, without showing any additional consideration. (3) Where A. has contracted a debt with B., and C. promises to pay it, the mere promise, unsupported by a consideration of benefit to the promisee or of injury to the promisor, is *nudum pactum*, and hence, as a mere collateral promise to pay the debt of another, it is within the statute, and all the essentials of the contract are not shown unless not only the names of the contracting parties appear in the writing, but there is also a note in writing of the entire contract, including the consideration, which, in this case, as it does not move between B. and C., but between A. and B., is a consideration of harm to B. and of corresponding benefit to A.; which, however, must appear by the writing, or there is no note in writing of the contract. (4) Where A. is indebted to B., and C., for some new consideration of benefit or harm moving between B. and C., the newly contracting parties, agrees to pay B. A.'s debt, although this still, in a sense, is a promise to pay the debt of another, yet, as it is a new and entire contract between B. and C., it is not within the statute, and does not require to be evidenced by writing.

The well-decided New York cases, following the leading case of Leonard *v.* Vredenburgh, 8 Johns. 29, as well as the equally well decided English cases, expressly sustain all these positions, in showing that the essential parts of the particular contract, under the statute, must all appear by the writing, or by fair inference from it. See Bailey *v.* Freeman, 11 Johns. 221, where such a contract as that in Leonard *v.* Vredenburgh, 8 Johns. 29, and, in effect, in Stadt *v.* Lill, 9 East, 348, is properly called "an *original, collateral* agreement." And see Rogers *v.* Kneeland, 13 Wend. 114, 123; Allen *v.* Jaquish, 21 Wend. 628; Union Bank *v.* Coster's Executors, 1 Sandf. 563; s. c. on appeal, 3 Comst. 203; Brickhead *v.* Brown, 5 Hill, 634; 2 Den. 375; Smith *v.* Weed, 20 Wend. 184; Watson *v.* Randall, 20 Wend. 201; Nelson *v.* Dubois, 13 Johns. 175; Farley *v.* Cleveland, 4 Cow. 432; 9 Cow. 639; Marquand *v.* Hipper, 12 Wend. 520; Douglas *v.* Howland, 24 Wend, 35; Parks *v.* Brinckerhoff, 2 Hill, 663; Manrow *v.* Dunham, 3 Hill, 584; Walrath *v.* Thompson, 4 Hill, 200; Hunt *v.* Brown, 5 Hill, 145; Potter *v.* The Ontario Mut. Ins. Co., 5 Hill, 147. See Spittle *v.* Lavender, 2 Br. & B. 452, as to the entirety of the transaction in that case.

The English use of Coldham *v.* Showler, 3 C. B. 312, is in the strictest accord with Leonard *v.* Vredenburgh, 8 Johns. 29, and the New York cases which follow it. There A. contracted to purchase of B. the good-will, etc., of a public house. On the back of the agreement was the following memorandum, written and signed by the defendant, after the execution of the agreement by A. and B.: "I hereby undertake that my daughter B. shall perform all the covenants and conditions named in the annexed agreement, and hold and consider myself responsible for her." Parol evidence was given, exactly as it was held in Leonard *v.* Vredenburgh,

The case of McMullen *v.* Heilberg[1] was decided on the principle that all the essentials of the contract to satisfy the statute must appear by the memorandum. There the defendant purchased at an auction certain lots of maize, the property of the plaintiffs, the bulk of which was in store. In an action for not removing the maize within the time mentioned in the conditions of sale, and to recover the loss upon a resale, the evidence showed that the sale was by sample, of which fact there was no mention in the note or memorandum of the contract made by the auctioneer at the time of the sale, as the agent of both of the parties to the sale, nor in a subsequent correspondence between the plaintiff and defendant. The court held that a material term of the contract not having been shown by any written note or memorandum, the statute was not satisfied.[2]

8 Johns. 29, it might be, to show that the agreement and guaranty were one entire transaction. It was contended on the part of the defendant, in an action on the guaranty, that the memorandum signed by the defendant was a mere collateral undertaking, within the 4th section of the statute of frauds, and void for want of a consideration expressed on the face of it. But the court held that, as the whole contract was one entire transaction, the consideration expressed in the agreement between A. & B. was sufficient to support the undertaking of the defendant; Maule, J., saying: "The circumstance of the one memorandum having been executed before the other was written makes no difference, provided the whole was one transaction." And Tindal, C. J.: "It is perfectly indifferent whether the signature was on one side of the paper or the other; the whole being one transaction, the signature of the defendant applies to all that precedes it." See Jones *v.* Cooper, 1 Cowp. 227, as to a collateral undertaking to pay for goods to be furnished to a third party.

[1] 6 L. R. Ir. 463.

[2] The same principle was acted upon in New York in Davis *v.* Shields, 26 Wend. 341. There the verbal contract was for the purchase of fifty tons of iron at $70 per ton, payable in six months from the delivery thereof, provided the iron arrived within a reasonable time, and was in good order. The only note or memorandum of the contract was one in the broker's book, which omitted all reference to the six months' credit, and to the provision that the iron must arrive in a reasonable time. The court held that the memorandum was insufficient to satisfy the requirements of the statute. So, where the broker delivers a different note of the contract to each of the contracting parties, there is no valid contract. Cumming *v.* Roebuck, Holt, 172; Grant *v.* Fletcher, 5 B. & C. 436; Suydam *v.* Clark, 2 Sandf. 133; Peltier *v.* Collins, 3 Wend. 459.

In Elmore *v.* Kingscote, 5 B. & C. 583, the note or memorandum in writing did not show the price that had been agreed upon for the subject-matter of the sale, and the court held that there was no sufficient memorandum of the contract to satisfy the statute. It was claimed for the vendor that there was a note in writing of a bargain for the purchase of a horse, and that it was competent for the plaintiff to prove the value of the horse by parol evidence, and to recover the amount under a *quantum valebant* count. But the court, in deciding otherwise, said: "There must be a note or memorandum in writing of the bargain. If it were competent to a party to prove by parol evidence the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent." But in Hoadly *v.* McLaine, 10 Bing. 482, where an order was given for goods, but no price was agreed on, the note or memorandum was held sufficient under the statute; as, in the absence of a price being fixed, a reasonable price would be implied. And whatever is necessarily implied may, without its being expressed, be taken to be in the instrument. *Per* Burrough, J., in Newbury *v.* Armstrong, 6 Bing. 201.

On very much the same principle that where a price is agreed upon it must appear in the writing, otherwise one of the leading objects of the statute would be defeated, it is now well established that a contract required to be in writing under the statute cannot be varied by parol, as

But to satisfy the statute, the memorandum may be supplied by

if it could, there would not be in the varied contract the written evidence of the contract which the statute requires.

By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what has passed between the parties, either before the written instrument was made or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to or subtract from or vary or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. Goss *v.* Lord Nugent, 5 B. & Ad. 64, *per* Denman, C. J.

But the statute requiring the contract or some note or memorandum of it to be evidenced by writing, materially qualifies this principle of the common law. We make an analysis of the cases on the subject, which have been generally supposed to be in irreconcilable conflict with each other, from which to exhibit the nature and extent of such qualification.

The case of Warren *v.* Stagg, Salisbury Spring Assizes, 1787, before Buller, J., cited 3 T. R. 591, is one of the earliest cases on the subject. That was an action of assumpsit for non-performance of an agreement to deliver to the plaintiff a certain quantity of barley on or before December 25, 1785. It was proved that the barley was originally to have been delivered on that day, but that it had been afterwards agreed that the defendant should have a month longer to perform the contract. It was thereupon objected that the contract proved was different from that laid in the declaration, for the first contract had been waived by the subsequent agreement; but Buller, J., held that it was only a continuation of the first contract, — a forbearance on the part of the plaintiff for a longer time, — and that a performance within the month by the defendant would have been a substantial performance within the meaning of the first contract; that one time might by mutual consent be substituted for another; and then a performance within the enlarged time would support a declaration on the original contract. But in Roe *v.* Harrison (A. D. 1788), 2 T. R. 427, where the lease contained a proviso that the lessee should not let the whole or part of the premises without leave in writing, on pain of forfeiting the lease, it was held that a parol license to let part of the premises did not discharge the lessee from the restriction of the proviso. And in Brown *v.* Goodman (A. D. 1789), E., 29 Geo. 3, B. R. 3 T. R. 592, n. (*b*), which was an action of debt on a bond, the bond being a common arbitration bond, in which the time was limited for the arbitrator to make his award, the declaration stated that the time was afterwards by the mutual consent of both parties enlarged, within which enlarged time the arbitrator made his award, and it then stated the breach. To this there was a demurrer. After argument at the bar, Lord Kenyon, C. J., said that the question was not then to be discussed whether the party had not some remedy, but whether his remedy lay on the bond, to determine which the court must look to the bond. There it appeared that the defendant had bound himself to abide by an award under a penalty, if made within a given time; and the court held that that could never extend the penalty to an award made after that time under a new agreement. So in Littler *v.* Holland (A. D. 1790), 3 T. R. 590, the plaintiff covenanted to build two houses for £500 by a certain day, and averred, in an action of covenant for the money, that the houses were built in the time. The evidence was that the time had been enlarged by parol agreement, and that the houses were finished within the enlarged time. It was held that this did not support the declaration, Lord Kenyon, C. J., in delivering the judgment, saying: "This point is so clear that I am not inclined to grant a rule to show cause. The declaration charges that the parties had stipulated by deed to perform a specific thing on a certain day. Then if the plaintiff, who sues on that contract, be not bound to prove it as laid, the defendant has no notice of that which he is called upon to answer. I remember an action being brought many years ago by Mr. Garrick, or one of the managers of the theatre, against Barry for not performing his contract. It appeared on the trial that the manager had given the defendant a parol license to be absent, but as the articles on which the action was founded required such a license to be in writing, the court held that it could not be dispensed with, and that the parol agreement was no answer to the plaintiff's action, though perhaps the defendant had another remedy in a court of equity."

Thresh *v.* Rake, 1 Esp. 53 (A. D. 1793),

documents and letters, written at various times, if they can be

was an action on the case, brought to recover the penalty for the breach of a special agreement. The agreement stated in the declaration was that the defendant had agreed to assign to the plaintiff certain premises, with the fixtures, etc., to be taken at a fair appraisement by brokers to be named on both sides. The appraisement was to be made on Aug. 13 following. It then averred, among other things, that the appraisement was made, and performance generally on the part of the plaintiff. It appeared in evidence that, in point of fact, the appraisement had not been made on the 13th, but on Aug. 14; but the delay was caused by the broker named on the part of the defendant, who did not send the inventory, without which the appraisement could not be made, to the plaintiff's broker until the 14th, when the plaintiff's broker, with the consent of the defendant's broker, who was acting as agent for him, made the appraisement; so that the delay was caused by the defendant's own default, and performance on the day was waived by his agent. It was insisted for the defendant that the evidence was inadmissible, as it was receiving parol evidence to vary a written contract; and that, as the pleadings stood, there was only one count on the agreement, averring the appraisement to have taken place on the 13th, when the evidence proved it to have really taken place on the 14th; and, therefore, that the evidence did not support the declaration. But it was ruled by Lord Kenyon, C. J., that the evidence was good and admissible; for that when the parties by consent enlarge the time within which an agreement is to be performed, that it is a continuance of the same contract, and on a declaration on the original contract, performance in the enlarged time is good evidence and will support the declaration.

The next important case on the subject is Cuff *v.* Penn (A. D. 1813), 1 M. & Sel. 21, which is considered to have been overruled by the later case of Stead *v.* Dauber, 10 A. & E. 57; which latter case is, however, itself doubted. See Blackburn on Sales, 2d ed., 116, 117. Cuff *v.* Penn, 1 M. & Sel. 21, was an action of assumpsit for not accepting a quantity of bacon, sold under a written contract, deliverable in lots in the different months from April to August, inclusive; the first delivery to be on April 20. On April 21, and not on the 20th, as stipulated by the contract, the first delivery was made; but it appeared that the defendant did not make any objection on that ground. After several deliveries of the bacon had been made, although not strictly on the days named in the contract, the defendant, on July 2, called on the plaintiffs and told them that as the sale of bacon was very dull, he hoped they would not press it on him. They assured him that they would not. Eighty-four sides were weighed at this time, and a further quantity on July 10. The plaintiffs, having forborne to deliver any more bacon for some time, at length informed the defendant that he had exceeded a reasonable time, and requested him to name a time for delivery. This the defendant declined, observing that the sales were very dull. After similar applications without effect, the balance of the bacon was weighed and sent to the defendant on Sept. 30, but he refused to receive it; having previously, in reply to the plaintiffs' application on the 28th, to attend and see it weighed, denied that there was any contract, and stated that he would not take the remainder of the bacon. The declaration contained three counts on the contract; the first averring that the plaintiffs delivered a part of the bacon, which was accepted and paid for by the defendant under the contract, and that the plaintiffs offered to deliver the residue, but the defendant would not accept it. In the second count it was averred that the plaintiffs intended and were about to deliver the residue under the contract, but the defendant, on July 2, discharged the plaintiffs from such delivery, and requested them not to deliver any more bacon until further orders from the defendant, to which the plaintiffs assented; the defendant promising to give orders and accept and pay for the residue of the bacon within a reasonable time, according to the terms of the original contract. In the third count it was averred that the defendant requested the plaintiffs to postpone the delivery of the residue of the bacon for a reasonable time. At the trial before Lord Ellenborough, C. J., it was objected on the part of the defendant that the written contract for the sale and purchase of goods could not be varied by parol; but if the subsequent parol agreement was to be considered, not as varying the written contract, but as substituting a new one in its place, then it was void by the statute of frauds. But Lord Ellenborough held that the action was maintainable, as there had been a dispensation only with the performance of the original contract in respect of the delivery of the bacon at the stipulated times. This view was concurred in by the full court. The court held (1) That there was a written note or memorandum which satisfied the statute, independent of the fact that there had also been an acceptance and actual receipt of part of the

properly connected, and if, coupled together, they contain by

goods. And (2) That that being so, the objection resolved itself into the question, not whether there had been a compliance with the statute, but more properly into that whether an agreement made in writing had been varied by parol. On this point, Lord Ellenborough, delivering the judgment of the court, said: "If this agreement has been varied by parol, I should have thought, on the authority of Meares *v.* Ansell, 3 Wils. 275, that there would have been strong grounds for the objection. But here what has been done is only in performance of the original contract. It is admitted that there was an agreed substitution of other days than those originally specified for its performance; still the contract remains. Suppose a delivery of live hogs instead of the bacon had been substituted and accepted, might not that have been given in evidence as accord and satisfaction? So here the parties have chosen to take a substituted performance. It is clear that neither of them in the outset thought it necessary to stand on the letter of the agreement; for the first delivery was to have taken place on April 20, and was not made until the 21st, and yet no objection was then taken. Afterwards a new mode of delivery is substituted at the defendant's express request. I am of opinion, therefore, that neither has the statute of frauds been trenched upon, nor has any rule of law respecting parol evidence not being admissible to vary a written agreement, been violated in this instance." It seems that there was a readiness and willingness on the part of the plaintiffs to deliver the residue of the bacon at the dates named in the contract, but that they did not do so at the request and for the accommodation of the defendant. There having been a note of the contract in writing to satisfy the statute, it is clear that the plaintiffs being ready and willing to deliver the residue of the bacon in accordance with the contract, the defendant would have been liable in an action for not accepting it, had he then absolutely refused to accept it. It would seem, therefore, — with the same readiness and willingness to deliver, — if the delivery were deferred at the request and for the accommodation of the defendant, on his ultimately refusing to take the residue of the bacon, an action would as well lie for his non-acceptance of it, as though he had refused in the first instance. The contract itself would seem to be as much intact, and as enforceable in the one case as in the other.

Cuff *v.* Penn, 1 M. & S. 21, was doubted by Parke, B., in Goss *v.* Lord Nugent, 5 B. & Ad. at p. 64. But Goss *v.* Lord Nugent, 5 B. & Ad. 58, is clearly distinguishable from Cuff *v.* Penn; as indeed is pointed out by Lord Denman, C. J., in delivering the judgment in Goss *v.* Lord Nugent, *Ibid.* at p. 67, where he says, referring to Cuff *v.* Penn, 1 M. & S. 21, and some of the other cases we have examined in this note: "These were cases where the time for the performance of the contract had been enlarged by a verbal agreement, and *they were decided on the ground that the original contract continued, and that it was only a substitution of different days of performance.* It is not necessary to say whether these cases were rightly decided. If they were so, still the present is a different case, for here, without doubt, the terms of the orginal contract were varied." The verdict in Cuff *v.* Penn, 1 M. & S. 21, was really entered on the second and third counts of the declaration. But the case was treated (see *per* the Solicitor-General, Park, and Lawes, at p. 24: "*Here the declaration contains counts on the original agreement,*" etc.) as though the verdict were given generally; and the whole spirit of Lord Ellenborough's judgment is that the evidence sustained the declaration *on the original contract*, thus: "Here what has been done is only *in performance of the original contract.*" No reference is made by the court to the fact that the verdict had not been given generally, and the only contract that the court seem to have had in mind in the case was that relied on in the first count of the declaration, referred to by the court, in their judgment, as a "contract for sale in writing." Of course, but for the first count of the declaration, the whole reasoning in the judgment would fail to apply to the case as it was in fact treated by the court, and the case itself would not establish the doctrine which was clearly in the mind of the court, and which is in the strictest harmony with the latest English cases on the subject.

In Goss *v.* Lord Nugent, 5 B. & Ad. 58, the plaintiff sold several lots of land to the defendant, the memorandum of the contract of sale providing that the vendor was to make a good title to the lots. This the plaintiff *was unable to do*, his title being defective as to one of the lots. The defendant verbally agreed to accept the lots, notwithstanding the defect in the title as to one of them, and possession of the whole was delivered to him. Subsequently he refused to complete the purchase. The court held that, under the statute, the contract had to be in writing, and that it was not the written contract which was sought to be enforced, but a

statement or reference all the essential parts of the bargain, signed by the party to be charged, or his duly authorized agent.[1]

new contract which the parties had entered into, and that that new contract was to be proved, partly by the former written agreement, and partly by the new verbal that there was no contract in writing. When the cause came on for hearing (Tawney *v.* Crowther, 3 Br. Ch. Cas. 318), the statute was insisted on by the answer, but Lord Thurlow adhered to his previous decision, and held that the agreement was sufficiently referred to by Crowther in his letter. In this case the agreement was not only put into writing, but it was kept in the custody of Crowther himself, so that no question arose as to his having actually in fact assented to the particular agreement which was prepared for his execution. Lord Thurlow thus dealt with the question, after having laid down the rule as we have stated it: "Crowther writes a letter referring to a paper in his own possession, and promises to perform it; such a letter would be sufficient to draw them from the objection, that the promise is not in writing. Then independent of the statute: if a letter now will bind the party, before the statute a parol agreement would have been binding. The question is, whether here is sufficient to raise a contract that will bind. If the letter cannot be referred to the agreement, or does not contain proper terms, I cannot treat it as out of the statute; but I confess, on what appears here, the papers do refer to that agreement, and contain a promise to perform it; the defendant did intend by the letter to raise a confidence that the agreement should be performed. If he had meant only to treat further, it would not have taken it out of the statute, being only *ad referendum;* but no doubt he meant to refer to the agreement which had been reduced to writing, and which he had carried away with him. The question is, whether the writing referred to in the attorney's letter was that which he wished to be signed. I think it was. Then Crowther said he would call on him. He admits that on the day he thought he should be there, he would call; he does not deny it was for the purpose of signing the agreement. This, if it refers to the agreement, is sufficient; and I think it does. There is evidence in the cause, of the parol agreement, which refers it to the head of cases where evidence is admitted of what passed by parol. It is argued that he took time, till Michaelmas, not to complete the former, but to make a further agreement. It is true the conveyance was to be at Michaelmas. Then what are his words? 'My word shall be as good as any security I could give.' The signing the paper was the security pointed to. On

[1] Lerned *v.* Wannemacher, 9 Allen, 412; Williams *v.* Bacon, 2 Gray, 387; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. 446; Thayer *v.* Fuller, 22 Ohio St. 62; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 274; Abeel *v.* Radcliffe, 13 Johns. 297; Osborn *v.* Phelps, 19 Conn. 63; Bates *v.* Col, 10 Conn. 292; Isham *v.* Morgan, 9 Conn. 378; Doty *v.* Wilder, 15 Ill. 407.

In Tawney *v.* Crowther, 3 Br. Ch. Cas. 318, Lord Thurlow thus lays down the rule as to references in letters to agreements, sufficient to satisfy the statute: "If the letter contains the terms of the agreement, or if it refers to another paper which contains the terms, that is sufficient; for I am of opinion that if a letter refers so clearly to an agreement as to show what was meant by the parties, where the existence of the paper is proved by parol, that will take the case out of the statute." The case in which this rule was laid down by Lord Thurlow, itself furnished an illustration of the difficulty which arises in the application of the rule. In Tawney *v.* Crowther (A. D. 1789), 3 Br. Ch. Cas. 161, the defendant, Crowther, being seised of a house which he was desirous of selling, the plaintiff employed an attorney to treat for the purchase; who agreed to give and Crowther to take £1100; and it was agreed between them that the agreement should be reduced into writing in order to be signed. It was accordingly reduced into writing; but Crowther wishing to receive the rent due at Michaelmas, possession was not to be delivered until then; but he declared that his word was as good as his bond, and that on the following Tuesday, he would call on the attorney and sign the agreement. Crowther not having kept his appointment, the attorney wrote him a letter saying that "though he had no doubt Crowther's word would be, as he had declared, as good as his bond, yet as life was uncertain, he wished the agreement to be signed." In answer to this, Crowther wrote a letter, in which he stated he had been from home, and acknowledged he had said his word should be as good as his bond, and that there was time enough from thence till Michaelmas to settle everything; and again repeated that his word should always be as good as any security he could give. Crowther having refused to complete the agreement, the plaintiff filed his bill for specific performance. Lord Thurlow overruled the defendant's plea of the statute of frauds,

agreement, the contract not being wholly in writing, and, therefore, not according to the general effect and meaning of the statute of frauds. The very marked dis-

the whole matter, therefore, he has agreed, by writing, to sign it. Several cases have been cited, and it has been argued that he declined to sign it. If he had said he never would sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it. If he said he would never sign it because he would not hamper himself by an agreement, it would be too perverse to be admitted; but here I am of opinion that the agreement must be performed." Tawney *v.* Crowther, 3 Br. Ch. Cas. 161, 318, was doubted by Lord Redesdale, in Clinan *v.* Cooke, 1 Sch. & Lef. 22, 34; but it was approved and followed in Foster *v.* Hale, 3 Ves. 696, 713.

In Clinan *v.* Cooke, 1 Sch. & Lef. 22, the defendant caused an advertisement to be inserted in the public papers, advertising land to be let for three lives or thirty-one years; application to be made to himself or to one M. In consequence of this advertisement, the plaintiffs applied to M., and entered into a treaty with him for a lease of the lands, a memorandum thereof being signed by M. and one of the plaintiffs. The memorandum contained no reference to the advertisement, nor to the term of years named in it. The plaintiffs tendered a lease for three lives, which the defendant refused to execute, and a bill was filed for specific performance. It was contended that the omission of the term might be supplied by reference to the advertisement. But Lord Redesdale held that this could not be done, (1) because the advertisement left the term uncertain, as it was there named as "three lives *or* thirty-one years;" and (2) because the agreement contained no reference to the advertisement. On this latter point, Lord Redesdale said: "Suppose the advertisement had expressed three lives only, you are then to connect these two transactions. How? By parol evidence. Now, if the agreement had referred to the advertisement, I agree parol evidence might have been permitted to show what was the thing (namely the advertisement) so referred to, for then it would be an agreement to grant for so much time as was expressed in the advertisement, and then the identity of the advertisement might be proved by parol evidence; but there is no reference whatever to the advertisement in this agreement."

In Brodie *v.* St. Paul, 1 Ves. Jr. 326, defendant having intimated his intention

In the old case of Hinde *v.* Whitehouse[1] where sugars were

to relet a farm, plaintiff proposed to become his tenant. They met for that purpose, when defendant read from a paper certain items as to the terms of their agreement, and an agreement was drawn up with reference to that paper, and the agreement, signed by both parties, was deposited in the hands of A. They were to meet again to complete the business. When they met again, the defendant's steward produced a paper containing covenants for a lease, which he represented to be the paper read to the plaintiff before the agreement, to which the articles of agreement referred. Plaintiff denied this; insisting that the covenants were new to him, and objecting to several. Defendant insisted that all the clauses contained in that paper should be covenants in any lease to be made by him; and that all of them had been read to the plaintiff at the first meeting. Plaintiff denied this; upon which the treaty was broken off, and the bill was brought for a specific performance of the agreement according to such clauses as the plaintiff alleged had been read to him, to prove which he went into parol evidence. Buller, J., sitting for the Lord Chancellor, in dismissing the bill, said: "The question here is, What is the agreement? The whole depends upon parol. If the agreement is certain, and explained in writing signed by the parties, that binds them; if not, and evidence is necessary to prove what the terms were, to admit it would effectually break in upon the statute, and introduce all the mischief, inconvenience, and uncertainty the statute was designed to prevent. The only thing to support this case would be to prove by parol evidence which of these covenants were read, and which were not: that is, directly prohibited by statute; and therefore the bill must be dismissed, but without costs, as the circumstances are not very favorable to the defendant." For cases where letters, sufficiently specifying the terms, have been held sufficient notes or memoranda of an agreement to satisfy the statute of frauds, see Foster *v.* Hale, 3 Ves. 396; Coles *v.* Trecothick, 9 Ves. 350; Fowle *v.* Freeman, 9 Ves. 351; Huddleston *v.* Briscoe, 11 Ves. 550, 583; Halsey *v.* Grant, 13 Ves. 73; Ogilvie *v.* Foljambe, 3 Mer. 53; 2 Jac. & W. 426; Gordon *v.* Trevelyan, 1 Price, 64; Backhouse *v.* Mohnn, 3 Swanst. 434, n; Stratford *v.* Bosworth, 2 Ves. & B. 341; Schneider *v.* Norris, 2 M. & S. 286.

[1] 7 East, 558.

sold by auction, the auctioneer, at the commencement of the sale, having the catalogue of the sugars to be sold, and also a written

tinction exists between this case and Cuff *v.* Penn, 1 M. & S. 21, that in this case the plaintiff was not himself in a position to perform his written contract at all, and therefore, could not maintain an action on it without reliance on the verbal agreement to give him a cause of action; so that, without such verbal agreement, the defendant could have refused to perform the contract in the first instance, and the plaintiff would have had no remedy. But in Cuff *v.* Penn, 1 M. & S. 21, there was a perfectly good contract within the statute, which the plaintiff was in a position to perform, and which, under the statute, he could have enforced in the first instance against the defendant, on his refusal then to accept the subject of the sale, without the necessity of resorting to any other than the written contract itself. The cases would have been analogous had the plaintiff, in Goss *v.* Lord Nugent, 5 B. & Ad. 58, been able and willing to have performed his contract to make a good title to all the lots; but for the accommodation, and at the request of the defendant, substituted a later day than that named in the agreement for closing up the transaction. See Parteriche *v.* Powlet, 2 Atk. 383; Price *v.* Dyer, 17 Ves. 356; 2 Story Eq. Jur. § 770 *a*; Townshend *v.* Stangroom, 6 Ves. 328, note (*a*), (Sumner's ed.); Brodie *v.* St. Paul, 1 *Ib.* 326, n. (*a*); Hare *v.* Shearwood, *Ib.* 241, n. (*a*).

Harvey *v.* Grabham, 5 A. & E. 61, is, in principle, essentially the same as Goss *v.* Lord Nugent, 5 B. & Ad. 58. The written agreement relating to the conveyance by lease of an interest in lands, within the 4th section of the statute, contained a clause that the straw, etc., on the lands should be valued by persons named respectively by plaintiff and defendants, and the amount paid to plaintiff by defendants. By verbal agreement this was altered by the parties, one person alone being agreed upon as the joint valuator. The court held, in accordance with Goss *v.* Lord Nugent, 5 B. & Ad. 58 (and see Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89), that this was a new agreement by parol, and was invalid to alter the written contract under the statute, which agreement could not be altered otherwise than by writing; for, if it could, it would follow that if the defendants had brought the action to enforce the execution of the lease, they would have been obliged to state the altered agreement as the consideration, and to aver a readiness to perform it, and would have had to prove their case partly by writing and partly by oral evidence, — the very predicament which the statute of frauds was intended to prevent. The marked distinction between Goss *v.* Lord Nugent, 5 B. & Ad. 58, and Harvey *v.* Grabham, 5 A. & E. 61, on the one hand, and Cuff *v.* Penn, 1 M. & S. 21, on the other, is, that in neither of the former cases could the plaintiff aver a readiness and willingness to perform the written contract according to its terms; but in each of those cases the plaintiff was forced, in order to make out a *primâ facie* cause of action, to declare on the parol agreement as altering the written agreement, which clearly the statute will not allow. In neither of those cases could the plaintiff have recovered on the original written agreement, because he could not show in effect a performance of its terms, and he was forced to rely upon the parol variation of the terms in order to make out a readiness to perform any contract at all. But in Cuff *v.* Penn, 1 M. & S. 21, the plaintiff could aver a readiness and willingness to perform his contract in accordance with its terms, and was not forced to depend upon an alleged altered contract. On the contrary, it was the defendant, then, who was driven to rely on an alleged altered contract; and the court held in effect, as in Goss *v.* Lord Nugent, 5 B. & Ad. 58, and in Harvey *v.* Grabham, 5 A. & E. 61, that the written agreement was the only agreement which could be enforced; the parol agreement, in neither of these cases, varying the terms of the original written agreement. As we have pointed out above, if, in Cuff *v.* Penn, 1 M. & S. 21, the defendant, instead of requesting delay in the delivery of the bacon had refused then to take it, he would at once have been liable for non-acceptance of the goods under the original written contract; whereas, in Goss *v.* Lord Nugent, 5 B. & Ad. 58, and Harvey *v.* Grabham, 5 A. & E. 61, as we have pointed out, the plaintiff, respectively, in these cases was only able to allege any cause of action at all by relying on the parol agreement, as giving a cause of action by an alleged variation of the written contract.

Stowell *v.* Robinson, 3 Bing. N. C. 928, is another case identical, in principle, with Goss *v.* Lord Nugent, 5 B. & Ad. 58, and Harvey *v.* Grabham, 5 A. & E. 61. In that case, the plaintiff paid the defendant a deposit of £50, under a written agreement for the sale of a lease of a public house to the plaintiff, possession of the house to be delivered by May 3. In an

paper containing the conditions of sale, in his left hand, at the same time, read the latter paper, as the conditions on which the

action for the return of the deposit money, *the defendant* alleged that neither the plaintiff nor defendant was ready by the day in the agreement mentioned for completing the purchase; that they therefore agreed to postpone the performance of it for a reasonable time, and that the plaintiff should accept an assignment of the lease if the defendant made out a title within such reasonable time; that within such reasonable time the defendant made it appear to the plaintiff that he had such title; but the plaintiff refused to perform the agreement, and prevented its completion. Here it was the defendant who was relying on an alleged variation by parol of a written contract within the statute. The defence could no more be sustained in this case, than the other party, if he had been bringing the action, as in Goss *v.* Lord Nugent, 5 B. & Ad. 58, and Harvey *v.* Grabham, 5 A. & E. 61, on a contract required to be in writing under the statute, could, with an alleged variation by parol, have sustained an action on a contract thus alleged and shown to be partly in writing and partly oral. And so, in effect, the court held, in Stowell *v.* Robinson, 3 Bing. N. C. 928, 937; Tindal, C. J., in delivering the judgment of the court, there saying: "Can the day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by a parol agreement, and another substituted in its place so as to bind the parties? We are of opinion that it cannot. This is an agreement for the sale of land, upon which, by the statute of frauds, sec. 4, no action can be brought 'unless it is in writing, and signed by the party to be charged, or his agent thereunto lawfully authorized.' Now we cannot get over the difficulty which has been pressed upon us, that to allow the substitution of a new stipulation as to the time of completing the contract by reason of a subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, and partly not in writing, but by parol only, amounts to a contravention of the statute of frauds. Such was the opinion expressed by Lord Chancellor Hardwicke in Parteriche *v.* Powlet, 2 Atk. 383; of Sir W. Grant, Master of the Rolls, in Price *v.* Dyer, 17 Ves. 356. And we think the reasoning upon which the judgment of the Court of King's Bench proceeds in Goss *v.* Lord Nugent, 5 B. & Ad. 58, goes directly to the point, that the evidence now under discussion is inadmissible." In this case, the defendant admitted his inability to perform an agreement, necessary to be in writing under the statute, and relied on a parol variation of it. Evidently that could not have been sustained without repealing the statute. Stead *v.* Dawber, 10 A. & E. 57, is not, we think, any more in antagonism with Cuff *v.* Penn, 1 M. & S., 21, than it is with Stowell *v.* Robinson, 3 Bing. N. C. 928; Goss *v.* Lord Nugent, 5 B. & Ad. 58; or Harvey *v.* Grabham, 5 A. & E. 61. We think, in fact, on the principle on which we have shown these cases to be reconcilable with each other, that Stead *v.* Dawber, 10 A. & E. 57, is quite reconcilable with all these cases. In Stead *v.* Dawber, the written contract was for the sale by the defendants to the plaintiff of a cargo of bones, to be delivered on "the 20th to the 22nd of May." The action was for the non-delivery of the bones. The declaration alleged a variation of the contract by an oral agreement between the parties, to the effect that the bones were to be delivered on May 24. The bones were not sent at that time, and the price was *afterwards* tendered, and refused by the defendants. The defendants pleaded, *inter alia*, that *a part of the contract declared on*, namely, as to the time for the delivery of the bones, was oral; to which the plaintiff replied that that was not a part of the contract. The court, in effect, held that it was, as in fact it was, a part of the contract on which the plaintiff had declared, and had relied on, in his declaration. The conclusion, then, was obvious, that a contract required to be in writing by the statute of frauds was not good where it was partly in writing and partly oral. It was quite another question, whether, in Stead *v.* Dawber, 10 A. & E. 57, where the demand for the bones, and the tender of the payment, were subsequent to May 24, the plaintiff could then have sustained an action on the original contract for their non-delivery on "the 20th to the 22nd;" but it is quite apparent that, differing in this important respect from Cuff *v.* Penn, 1 M. & S. 21, where the action was on the original contract, no such attempt was made; but the action, in effect, in Stead *v.* Dawber, 10 A. & E. 57, was on the original written contract as essentially varied by the subsequent oral contract, and, we think without any possible escape from so holding, the court properly held that the contract declared on was a contract within the statute of frauds, and could not be proved, as to any essential part of it, by merely oral testimony; "for to allow such

sale of the sugars mentioned in the catalogue was to proceed, to the company assembled, including the defendant. The paper con-

a contract to be proved partly by writing, and partly by oral testimony, would let in all the mischiefs which it was the object of the statute to exclude." *Ibid.*, at p. 64.

Cuff *v.* Penn, 1 M. & S. 21, which was questioned by Parke, J., in Goss *v.* Lord Nugent, 5 B. & Ad. at p. 64, and which has been assumed in some of the later cases, and by some of the text-writers, to have been overruled by Stead *v.* Dawber, 10 A. & E. 57, is not, we think, at all affected by this latter case. The distinction is obvious that in Cuff *v.* Penn, 1 M. & S. 21, the action was held sustainable on the original written contract; while, quite in accord with the holding in that case, it was held in Stead *v.* Dawber, 10 A. & E. 57, that an action on a contract within the statute could not be sustained where the contract relied on to sustain such action was an alleged oral variation of a written contract; thus, against the requirements of the statute, the object being to establish a contract which was partly in writing and partly merely oral. See the report of Stead *v.* Dawber in 2 Per. & Dav. 447, where the averment by the plaintiff in his declaration is stated as that *from May* 24 (the contract time enlarged by the oral agreement) the plaintiff had been always willing to accept and pay for the bones by a bill, etc.; and that *on May* 24 the defendants were requested to deliver the bones. This shows very plainly that the plaintiff was relying, under the statute, upon the orally enlarged contract, and not upon the original written contract. This, we submit, is the test; if the plaintiff in bringing his action cannot sustain it under the original written contract, as he could not have done in Stowell *v.* Robinson, 3 Bing. N. C. 928; Goss *v.* Lord Nugent, 5 B. & Ad. 58, or Harvey *v.* Grabham, 5 A. & E. 61, but has to resort to the orally altered contract, because of his own inability to rely on the written contract, there, under the statute, he must fail. But where, as in Cuff *v.* Penn, 1 M. & S. 21; Warren *v.* Stagg, cited in 3 T. R. 591, and possibly as in Thresh *v.* Rake, 1 Esp. 53, where, apparently (see in Stead *v.* Dawber, 10 A. & E. at p. 62), the agreement was not within the statute at all, the plaintiff is in a position to enforce the original contract, and the defendant is driven, as a defence, to rely on an alleged oral variation of the written contract; there the original contract, not having in fact been rescinded by the oral agreement, remains intact, and in seeking to enforce the written contract no attempt is made by the plaintiff to contravene the statute; and he is no more debarred from recovering by such an act as giving time to the defendant at his request, than he would have been had the defendant, instead of asking for time, for instance, to receive the goods sold to him, absolutely refused to accept them at the time named in the written contract; there being at such time a readiness and willingness on the part of the plaintiff to deliver them according to the terms of the contract in writing under the statute.

The case of Marshall *v.* Lynn, 6 M. & W. 109, we think, properly considered, does not contravene, but in principle affirms, the correctness of the rule we have above deduced. The head-note of the case is an exact affirmance of the doctrine we have above laid down. The head-note is: "The terms of a written contract for the sale of goods falling within the operation of the statute of frauds cannot be varied or altered by parol; and where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing." The contract in Marshall *v.* Lynn, 6 M. & W. 109, was in writing, and was for the sale and shipment to the defendant, in the plaintiff's own vessel, on her next arrival at Wisbech, of a cargo of potatoes. The potatoes were not shipped in accordance with the contract on the next arrival of the vessel at Wisbech; but the plaintiff, in an action for the non-acceptance of the potatoes, alleged in his declaration a new oral agreement to the effect that they should be shipped at a later voyage of the vessel. Not having shipped the potatoes under the terms of the written contract, the plaintiff considered that he was not in a position to enforce that contract, and he therefore, directly against the statute, undertook in his declaration to set up and rely on an oral variation of the written contract for the sale of goods, which by the statute — the other statutory evidence of the contract being wanting — was required to be wholly evidenced by writing. Had the plaintiff declared on the written contract, and averred and proved a readiness and willingness to have performed it, or had he shipped the potatoes according to the terms of his written contract, so that he could have clearly brought his action on the written contract, and not on a contract under the statute, alleged in his declaration to have been made orally in part; and then, on the arrival of the vessel at her destination, and the tendering of the

taining the conditions was entitled "Condition of Sugar Sale, Sept. 20, 1805." After reading it, he deposited it on his desk un-

cargo to the defendant, the latter had requested and obtained a deferring of the delivery and of the payment, which was to be "cash on delivery," and had then subsequently refused to receive the potatoes at all; as the plaintiff could then have declared, as was done in the first count of the declaration in Cuff *v.* Penn, 1 M. & S. 21, not on the alleged orally varied contract, but on the written contract, the alleged oral variation in the mode of performing the contract would not have affected the plaintiff's rights, as the statutory evidence of the contract he was in a position to enforce was contained in the writing; and, for a defence, the defendant, unless he could have traversed the plaintiff's readiness and willingness, would have then been driven to a reliance on the alleged parol variance of the written contract, which alleged variance then, as was held in the case itself, would, under the statute, have been invalid as against the written contract; it remaining intact. Marshall *v.* Lynn, 6 M. & W. 109, was decided on the assumption that Cuff *v.* Penn, 1 M. & S. 21, was overruled by Stead *v.* Dawber, 10 A. & E. 57, which we think is clear was not the case. And we think, as in Cuff *v.* Penn, 1 M. & S. 21, with respect to that portion of the bacon for the non-acceptance of which the action was brought, the plaintiff was in a position to rely upon the original written contract, and to aver a readiness and willingness to perform his contract thereunder, as in the first count in his declaration he substantially did; it is in this important respect distinguishable also from Marshall *v.* Lynn, 6 M. & W. 109, where the plaintiff declared upon the oral variation of the written contract; the principle stated in the head-note we have quoted above from Marshall *v.* Lynn, 6 M. & W. 109, being generally applicable, and as applicable to Cuff *v.* Penn, 1 M. & S. 21, as to Stead *v.* Dawber, 10 A. & E. 57; Marshall *v.* Lynn, 6 M. & W. 109, or the other cases under the statute which we have examined above. But it is clear, notwithstanding the view of Cuff *v.* Penn, 1 M. & S. 21, taken in Marshall *v.* Lynn, 6 M. & W. 109, that had the plaintiff in this latter case simply declared on the original agreement, and averred a readiness and willingness to perform it, under the decision not only in Cuff *v.* Penn, 1 M. & S. 21, but in the whole mass of the latest of the English cases on the subject, the facts in the case would not have interfered with his sustaining his declaration, or with his right of enforcing the original contract under it. According to the facts he was then ready and willing to perform his contract, and was then in a position to legally enforce it. And if, then, at the request of the defendant, and to accommodate the latter, the time for the performance of the contract was deferred; this neither rescinded the contract nor enabled the defendant to have availed himself of the plea that it was varied by the subsequent parol agreement.

The case of Emmet *v.* Dewhurst, 3 Mac. & G. 587, 596, is in exact accord with these principles, namely, that an agreement within the statute of frauds must be in writing, and any alteration of it must also be in writing; and that the party, whether plaintiff or defendant, who, to make out his case, is driven to a reliance on the allegation and proof of a variation of a written agreement, or to the formation of a new agreement, must evidence such variation or new agreement by some writing to satisfy the statute.

Moore *v.* Campbell, 10 Ex. 323; 23 L. J. N. S. Ex. 310, holds that where there has been a written agreement for the delivery of goods on the quay, and a parol agreement to substitute a delivery from the warehouse; as this parol agreement, as such, is invalid under the statute, it does not sustain the plea that the original written contract was rescinded; yet if the vendee had accepted and received the goods in the warehouse, to be delivered under the written contract, instead of at the quay, this would have been a good answer by way of accord and satisfaction. The principle of this case is that the contract, which, as such, is enforceable, is the written contract.

Noble *v.* Ward, L. R. 1 Ex. 117, affirmed on appeal in the Exchequer Chamber, L. R. 2 Ex. 135, is also in accord with the law as we have stated it above. There, the plaintiff made a contract in writing with the defendant, for the sale of certain goods of more than £10 in value, at specified prices, to be delivered within a specified time. Subsequently, and before the time for delivery had arrived, a parol agreement between the parties was entered into, whereby the time for delivery was extended. In the action for non-acceptance of the goods, it was claimed that the written agreement had been rescinded by the parol agreement, and that under the statute, the parol agreement itself could not be enforced; and, on the trial, it was so held by Bramwell, B. But, on motion for a new trial, a rule therefor

der the catalogue, on which catalogue he wrote his minutes of the bidders' names and the prices; but the two papers were not

was made absolute, Bramwell, B., delivering the judgment, and admitting that he had been wrong on the trial. The judgment, as intimated above, was on appeal affirmed by the Exchequer Chamber. In this case as in Cuff *v.* Penn, 1 M. & S. 21, the plaintiff was not driven to rely on the alleged parol variation of the written contract, the goods having been tendered by him within the time named in the written contract, so that he was in a position to allege and prove, as in effect was the plaintiff in Cuff *v.* Penn, 1 M. & S. 21, a readiness and willingness to perform his contract within the time agreed in the written contract. The courts held that as it was not the intention of the parties to rescind the written contract by the oral agreement, and as this latter was inoperative to vary the written contract, the written agreement remained in force. The *ratio decidendi* of this case is that where the written agreement is not rescinded by the oral agreement, as the oral agreement is, under the statute, inoperative to vary the written agreement, if the plaintiff is in a position, as in Noble *v.* Ward, L. R. 1 Ex. 117; L. R. 2 Ex. 135, and in effect in Cuff *v.* Penn, 1 M. & S. 21, to declare on the original agreement, and to bring himself within it, he can do so, and the alleged parol variation of the written agreement is invalid as a defence to the action. Willes, J., in the Court of Exchequer Chamber, said: "It is quite in accordance with the cases of Doe *v.* Courtenay, 11 Q. B. 702, and Doe *v.* Poole, 11 Q. B. 713, overruling the previous decision of Doe *v.* Forwood, 3 Q. B. 67 (see 11 Q. B. 723), to hold that where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold there was no such intention."

Ogle *v.* Earl Vane, L. R. 2 Q. B. 275, involves quite a different point from that in either of the previous cases we have examined. There the defendant by written agreements contracted to deliver to the plaintiff 500 tons of iron in all, during the quarters ending, respectively, on the 18th, 22nd, and 25th July. None of the iron was delivered down to these dates, nor down to February following; the plaintiff waiting at the request of the defendant until then; when, losing all patience, he went into the market and purchased on a rising market. In his action under the contract, damages were assessed at the market price in February, which was much higher than it was in July. It was claimed for the defendant that the statute of frauds applied, and that as the alleged parol agreement was invalid to alter the original contract, the damages should have been assessed as at the time of the breach of the contracts in July. But the court held that there was no variation of the original contracts, and that while what was done between the parties amounted to a postponement of the day at which the plaintiff might go into the market, and at which the jury might calculate the measure of damages; yet that the plaintiff did not make a binding parol contract at law, because he never contracted at all; and, therefore, although at the request of the defendant the plaintiff had the right to defer making his purchases, yet this was not a matter within the statute of frauds.

In one aspect, Ogle *v.* Earl Vane, L. R. 2 Q. B. 175, is, in principle, like the much discussed case of Cuff *v.* Penn, 1 M. & S. 21. In each of these cases the action was brought under the original written contract; and it is a clear principle that, unless the plaintiff is in a position to sustain his action under the written contract, within the statute, he must fail; a parol agreement being invalid to vary a contract that is within the statute, though it may be operative to rescind it, if such is the intention of the parties; and, though it is competent for the parties to substitute a different performance of the contract. Ogle *v.* Earl Vane, L. R. 2 Q. B. 275, was, on appeal, affirmed by the Exchequer Chamber (Ogle *v.* Earl Vane, L. R. 3 Q. B. 272), where it was held that there was evidence from which the jury might infer that the plaintiff's delay was at the defendant's request; that, as the evidence went to show not a new contract, but simply a forbearance by the plaintiff, at the request of the defendant, the statute of frauds did not apply, and that the plaintiff was entitled to a verdict for the full measure of damages. This again is, in principle, very similar to the holding in Cuff *v.* Penn, 1 M. & S. 21; the plaintiff there having been in a position to enforce his contract, but voluntarily and gratuitously forbearing at the request of the defendant.

On the same doctrine that parol evidence cannot be admitted to vary a written contract for the sale of goods within the

fastened together in any manner, nor was there any reference in the papers to each other. The court held that there was no suffi-

statute, it was contended by counsel (Benjamin, Q. C., and Baylis), in Stewart *v.* Eddowes; Hudson *v.* Stewart, L. R. 9 C. P. 311, that, after an agreement within the statute had been signed, it could not be altered, as it was claimed that that would be to allow oral proof of a change in a written contract under the statute. But the court held that, until the signature was to an instrument which was an agreement, there was no contract within the statute, and hence it was open to show by parol evidence what was the condition of the paper when the parties agreed that it should be a contract between them. In this case, after the signature, there were interlineations in the writing before it was finally agreed on, and it was held to be open to oral proof that the written and signed agreement between the parties was the instrument with the interlineations.

The Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140, comes within the principle of Ogle *v.* Earl Vane, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272, and of that upon which Cuff *v.* Penn, 1 M. & S. 21, is sustainable. There, in The Leather Cloth Co. *v.* Hieronimus, the defendant's son, H. Jr., gave a verbal order in London, on February 18, 1870, to the plaintiffs to send three cases of leather cloth to the defendant at Cologne. The plaintiffs had been in the habit of forwarding goods to the defendant through H. & P., Rotterdam, and H. Jr., being informed that the port of Rotterdam was blocked with ice, directed that the three cases should be sent through Messrs. G., Ostend. When the plaintiffs had executed the order Rotterdam was again open, and Messrs. G. had given up their Ostend route. The plaintiffs, therefore, forwarded the three cases through H. & P., *via* Rotterdam, and on the same day, March 1, they forwarded the invoice from the plaintiffs to the defendant, giving the price, etc., with a letter in which they said: "Inclosed we hand you invoice of three cases of leather cloth. This order came through Mr. H., Jr., who instructed us to send it through Messrs. G., Ostend, but, as they have given up that route, we have sent it through H. & P., Rotterdam, as before." The defendant received, but did not answer, this letter, but gave further orders for goods to the plaintiffs, which were forwarded *via* Rotterdam. The ship by which the three cases were sent was stranded and the goods damaged. On June 28 the plaintiffs wrote to the defendant, inclosing their statement of account and requesting payment, and on July 5 defendant wrote to plaintiffs, acknowledging the receipt of the statement, and saying: "In looking over your statement I find you have charged me for goods which have been entirely lost in the sunk ship, being sent *via* Rotterdam. You state in your letter of March 1 that Mr. H., Jr., instructed you to send the goods through Messrs. G., Ostend, but on account of their having given up that route you sent, without any instructions, the goods *via* Rotterdam." Further correspondence ensued, and defendant having refused to pay for the three cases, an action was brought, and the above facts and correspondence appeared on the trial. The judge ruled that there was a sufficient memorandum in writing, signed by the defendant, of the contract, and left it to the jury to say, from the silence and subsequent conduct of defendant, whether or not there had been an assent by him to the change of route from Ostend to Rotterdam before the loss. And they found in the affirmative, and a verdict passed for the plaintiffs. On motion for a new trial the verdict was sustained, the court holding that there was a sufficient memorandum of the original contract, and that there was evidence from which the jury might find that the defendant had assented *to the substituted performance in the change of route, which assent need not be in writing.* Blackburn, J., in his judgment, in answer to the contention of the defendant that there was no assent in writing to the alleged substituted contract, put the matter on precisely the basis on which we have been able, on principle, to reconcile and sustain the cases of Cuff *v.* Penn, 1 M. & S. 21; Stead *v.* Dawber, 10 A. & E. 57, and the other cases we have examined, which in so many cases and by so many writers have been deemed contradictory and irreconcilable, thus: "The plaintiffs do not rely on a substituted contract, but on the original contract; and they say you, the defendant, on being told of the substituted delivery, did not object, but, by your conduct, assented to it. I cannot see why the assent to a substituted mode of performing one of the terms of a contract need be in writing, and may not be by parol, though the original contract must have been in writing. They are quite different things,—the proof of a substituted contract and the proof of a ratification or approval, after performance, of the substituted mode of performance. I think there was evidence enough for inferring this ratification or approval by the defendant." Leather

cient memorandum of the contract between the parties, signed by the party to be charged, to satisfy the statute.[1]

Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. at p. 146. This is, in effect, precisely the argument of Lord Ellenborough in Cuff *v.* Penn, 1 M. & S. at pp. 23, 26, *et seq.*

The case of Tyers *v.* The Rosedale, &c. Iron Co., L. R. 8 Ex. 305, reversed, on appeal, in the Exchequer Chamber, L. R. 30 Ex. 195, is another highly instructive case on this important subject. In this case there were two contracts in writing for 1000 tons each of iron, entered into in October and November, 1870, respectively, for delivery by the defendants to the plaintiffs in monthly quantities extending over 1871, or sooner if required; payment being by plaintiffs' four months' acceptance from the 10th of the month following delivery. The case is very like that of Cuff *v.* Penn, 1 M. & S. 21, and the ultimate decision is an affirmation of that of Cuff *v.* Penn. The counts in the declarations in the two cases were very similar. The first and second counts in Tyers *v.* The Rosedale, &c. Iron Co., were on the written contract, as was also the third count; but in this latter there was an averment that, under an agreement between the parties, the time for the delivery had been enlarged. Instead of 166⅔ tons of the iron having been delivered in January, 1871, only 101 tons were then delivered, and smaller quantities were delivered in the following months; the plaintiffs, for their own convenience, urging the defendants to withhold the deliveries, which, to a considerable extent, was done. In September, October, November, and December, 1871, the plaintiffs pressed for full deliveries of the iron, and small quantities were sent to them, but not nearly the quantities for those months, without reference to the previous short quantities delivered. On Dec. 5, the plaintiffs required the balance of the 2000 tons of iron to be delivered that month, and, on Dec. 7, they further notified the defendants to deliver the balance, 1280 tons; but the plaintiffs refused to deliver any more than the December portion, the one-twelfth of the 2000 tons. In an action for the non-delivery of the balance of the iron, before Blackburn, J., without a jury, it was ruled that the effect of the different postponements at the request of the plaintiffs and by the consent of the defendants, was not to put an end to the contract, but only to postpone the time for the delivery, and that, consequently, there was a breach of contract in refusing to deliver the iron. The majority of the court (Kelly, C. B., and Pigott, B., Martin, B., dissenting), improperly treating Cuff *v.* Penn, 1 M. & S. 21, as having been overruled by Moore *v.* Campbell, 10 Ex. 323; Goss *v.* Lord Nugent, 5 B. & Ad. 58; Stead *v.* Dawber, 10 A. & E. 57, and Marshall *v.* Lynn, 6 M. & W. 109, held, in effect, the unsound doctrine that the parol agreement had altered the written agreement, and that the plaintiffs could not recover, and made absolute a rule to enter the verdict for the defendants. But on appeal to the Court of Exchequer Chamber (L. R. 10 Ex. 195), the decision, as intimated above, was reversed. Cockburn, C. J., said: "There was a contract to purchase 2000 tons of iron to be delivered in monthly instalments. It did not suit the purchasers to take the iron in the instalments originally contemplated by the parties, and they proposed to the sellers to postpone from time to time the delivery of the monthly instalments. Now it would have been perfectly competent to the defendants to say, 'We will not acquiesce in that proposal of yours. You

[1] Lord Ellenborough, in delivering the judgment of the court, said: "Supposing the auctioneer or broker for sale to be the agent of both parties, the question then is, has he made a memorandum of the bargain in this case? — and it appears to me he has not. The minute made on the catalogue of sale, which is not annexed to the conditions of sale, nor has any reference thereto by context or the like, is a mere memorandum of the name of a person, whom, perhaps, we may intend to be the purchaser, and of the quantity and price of the goods, which we may, perhaps, on the foot of such memorandum, also intend to have been sold to the person so named in the catalogue. But in treating it as such memorandum throughout, we must intend also (contrary to the fact) that the goods were sold for ready money, and unattended by the circumstances specified in the conditions of sale. And the conditions of sale, though, as unsigned, they cannot be evidence of the bargain itself, are yet capable of being given in evidence, and, accordingly, have been so, as a part of the transaction between the parties, and in order to show that it was on those conditions that the goods were sold. I am of opinion, therefore, that the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a bargain under those conditions of sale." Hinde *v.* Whitehouse, 7 East, 569.

The case of Boydell *v.* Drummond[1] was similarly decided. In this case a prospectus was issued in 1786, and another in 1787, of

are bound to take the iron month by month, and you must so take it or consider the contract at an end.' Instead of doing that, the defendants, as I read the letters, acquiesced, not in holding the contract at an end, but in postponing the period of delivery." Blackburn, J., thus met the technical difficulty, that the plaintiffs were bound to show that they were ready and willing to receive the iron when it ought to have been delivered: "The answer is: 'We were ready to receive the iron when you were ready to deliver it, but we requested you not to require us to receive it, and you consented.'" By the nature of the pleadings, the effect was that the plaintiffs were seeking to enforce a contract in writing under the 17th section of the statute, for the sale of goods, and the defendants were seeking to avoid such statutory written agreement by the contention, not that the parol agreement had rescinded the written contract, as it may do, but that the written agreement had been effectually varied by the parol agreement, so as to change the nature of the contract, and yet, that the contract as extended by the parol agreement, could not be enforced. The plaintiffs' position, and the holding of the court, in effect, were that the written agreement had not been rescinded nor varied by the consent to defer the deliveries, and that, until performed or rescinded, it remained a subsisting agreement, which could be enforced by either of the parties to it. The court also held that, had they requested it, the defendants would have had a reasonable time to deliver the iron after the balance was demanded in December; but their absolute refusal to deliver at all entitled the plaintiffs to recover damages in the existing action.

The later case of Hickman *v.* Haynes, L. R. 10 C. P. 598, is a still further affirmation of the principles laid down by Lord Ellenborough in Cuff *v.* Penn, 1 M. & S. 21, to the effect that where there is simply a forbearance to deliver the goods at the request of the other, this is not a rescission of the written contract, nor a substitution of a new contract for the old, but is merely a forbearance to enforce the old contract, which still remains intact and capable of being enforced. In Hickman *v.* Haynes, L. R. 10 C. P. 598, by a written contract the plaintiff agreed to deliver, and the defendants to accept, in the month of June, a certain quantity of iron of greater value than £10. On June 2, and again in the middle of June, one of the defendants saw the plaintiff, and verbally requested him to allow the delivery of the iron to stand over, and the plaintiff verbally consented to his request. On Aug. 1, the plaintiff pressed the defendants to take delivery, and the defendants, after some correspondence, wrote on Aug. 9 asking for further time. The plaintiff again waited, but without result. On Oct. 20, the plaintiff brought his action for non-acceptance of the goods in accordance with the terms of the written contract. It was contended by the defendants that by reason of the arrangement to postpone delivery and acceptance made before any breach of the contract, the plaintiff could not recover upon the original contract, there never having been readiness and willingness to deliver or any tender of delivery on the plaintiff's part under such contract; and that the plaintiff could not rely on any new or substituted contract to accept at a later date, such contract being verbal only. The court held that the true effect of what took place between the parties being that the plaintiff voluntarily withheld delivery at the request of the defendants, no new contract being substituted for the original written contract, the plaintiff was entitled to maintain his action; and that the damages must be estimated according to the market price of iron at a reasonable time after the last request of the defendants to withhold delivery.

The law in the matter, on one branch of it, is well summarized by Brett, J., in delivering the judgment in the latest English case on the subject, of Plevins *v.* Downing, 1 C. P. Div. 220, 224. This was an action for non-acceptance of iron pursuant to contract, the declaration being on the original written contract. The plea, among others, was that the plaintiffs were not ready and willing to deliver the iron according to the terms of the contract. The bought-note, signed by the defendant, dated June 15, 1874, on which the action was founded, was as follows: "Bought of Messrs. Plevins & Co., 100 tons of gray forge pig iron at 75*s.* per ton, delivered to my works. Payment in cash, less 2½ per cent. discount, on the 10th of each month following delivery. Delivery, 25 tons at once, and 75 tons in July next." The 25 tons were delivered immediately, and 50 tons more in July. There was no evidence of any request by the defendant to the plaintiffs, made before the end of

[1] 11 East, 142.

a series of prints from scenes of some of Shakespeare's plays. The defendant subscribed for these plates. Printed copies of the two

July, to withhold delivery of the remaining 25 tons till after the end of July. But there was evidence of a conversation between the defendant and the plaintiffs' manager in October, which the court treated as a verbal request by the defendant to send him the remaining 25 tons then. And the plaintiffs did, in October, forward 25 tons addressed to the defendant, but not at his works; and the defendant, on being informed by letter that the iron had been despatched, declined to receive it. On the trial, before Quain, J., a verdict was entered for the defendant, leave being reserved to enter the verdict for the plaintiffs if the court should be of opinion that there was any evidence of a delivery and acceptance within the contract.

The court sustained the verdict, on a principle which, with that governing the decisions in Tyers *v.* Rosedale, &c. Iron Co., L. R. 8 Ex. 305; L. R. 10 Ex. 195; Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140; Ogle *v.* Lord Vane, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; Hickman *v.* Haynes, L. R. 10 C. P. 598, examined *supra*, sustains the decision in Cuff *v.* Penn, 1 M. & S. 21, where the action was on the original written contract, with, in effect, an averment of readiness and willingness to perform it; and, on principle, only sustains such cases as Stead *v.* Dawber, 10 A. & E. 57, and Marshall *v.* Lynn, 6 M. & W. 109, on the ground that in these cases the actions were, not on the original contract, with an averment of readiness and willingness to perform it, but on the written contract, with an alleged variation of the contract by parol. The principle, as we have before intimated, being, that where either the plaintiff or defendant is compelled, in order to sustain his case, to rely, not on the original contract, with an averment of readiness and willingness to perform it, but on a substituted parol contract, with an averment of readiness and willingness to perform it, there he must fail, as the party must stand or fall by his right to enforce the written contract, on a breach, by the other party, of that contract; mere forbearance, however, by either party, neither working a rescission of the contract, nor a variation of it.

Brett, J., in Plevins *v.* Downing, 1 C. P. Div. at p. 225, said: "It was argued for the plaintiffs that they could maintain the action upon the original contract; that they were not driven to rely upon an alteration of it as to the period of delivery, or upon a new contract; that the request of the defendant, acceded to by the plaintiffs, was only an arrangement as to a mode of performing the original contract. It was further argued that if there was a new contract, there was evidence of a delivery under it, which entitled the plaintiffs to sue for the price of good sold and delivered. It seems to us, however, that the verdict was rightly directed to be entered for the defendant. It is true that a distinction has been pointed out and recognized between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect, in favor of either, to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words, it can be enforced. The question is, what is the test, in such an action as the present, whether the case is within the one rule or the other.

"Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver, and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract. He shows that he was so, but that he did not offer to deliver within the agreed time because he was within such time requested by the vendee not to do so. In such case it is said that the original contract is unaltered, and that the arrangement has reference only to the mode of performing it. [This, we think, is entirely correct.] But, if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract (*a*). The statement shows that he was not. He would be

(*a*) As the alleged assent in Plevins *v.* Downing, 1 C. P. Div. 220, was in October, after the breach of the contract in July by the plaintiffs, and a right of action

prospectuses, containing the conditions on which the prints were to be furnished the subscribers, were lying about the plaintiff's shop for

driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do so as to enforce his claim. This seems to be the result of the cases which are summed up in Hickman *v.* Haynes, L. R. 10 C. P. 598. [We doubt this very much. See our comments below.] In the present case, the plaintiffs cannot prove that they were ready and willing to deliver the disputed iron in July. They cannot say that, being so ready, they withheld an offer to deliver in July at the request of the defendant made in July. The day after the end of July they could not have insisted on an acceptance of iron then offered to the defendant. They attempt to enforce an offer of delivery made in October by means of an alleged request then made by the defendant to forward iron assented to by them. Inasmuch as they cannot rely upon their readiness and willingness to deliver according to the terms of the original contract, because they were not so ready and willing, they are logically driven to rely upon the subsequent request of the defendant, either as a proposed alteration of a term of the original contract, or as a request upon which to hang a new contract to accept. But, as the request was merely verbal, the undertaking sought to be founded on it cannot be enforced."

We think that, on the facts of the cases and the pleadings, Plevins *v.* Downing, 1 C. P. Div. 220; Hickman *v.* Haynes, L. R. 10 C. P. 598; Ogle *v.* Lord Vane, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140; Tyers *v.* Rosedale, &c. Iron Co., L. R. 8 Ex. 305; L. R. 10 Ex. 195, and Cuff *v.* Penn, 1 M. & S. 21, were all well decided; but we think that neither the result of the cases summed up in Hickman *v.* Haynes, L. R. 10 C. P. 598, nor the decision in that case, warrants the conclusion of the court in Plevins *v.* Downing, 1 C. P. Div. 220, that "if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract."

Among the cases summed up and recognized as law, in Hickman *v.* Haynes, L. R. 10 C. P. 598 604–606, were Leather Cloth Co. *v.* Hieronymus, L. R. 10 Q. B. 140, and Tyers *v.* Rosedale, &c. Iron Co., L. R. 10 Ex. 195. In the former of these cases there was certainly no request of the vendee for the substituted mode of the performance of the contract. The most that could be said there was, that the vendee assented to the substituted mode adopted by the vendor without his having even asked the vendee for his consent; the silence of the vendee, after having been advised of the substituted mode of performance of the contract, having been treated as an assent to it. Tyers *v.* Rosedale, &c. Iron Co., L. R. 10 Ex. 195, is, we think, a still more emphatic refutation of the *extra-judicial* conclusion of the court in Plevins *v.* Downing, 1 C. P. Div. 220, 225 *et seq.*, that where the delay in the period of delivery is made at the request of the vendor, there the vendor cannot recover on the original contract, and, therefore, cannot recover at all, because he could not aver and prove a readiness and willingness to deliver according to the terms of the original contract.

We have already referred to the fact above, that in Tyers *v.* Rosedale, &c. Iron

for such breach had vested in the defendant, this is, to that extent, *obiter dictum*. Considering what we think is the well-decided case of Tyers *v.* The Rosedale, &c. Iron Co., L. R. 10 Ex. 195, see *per* Blackburn, J., at p. 197; where, it is true, the delay in the delivery was at the request of the vendee, but as he was the plaintiff in that case, seeking to enforce the original written contract, this is not material; it would seem to us that where, as in Tyers *v.* The Rosedale, &c. Iron Co., there was a substantial, though not an actual, "readiness and willingness," as the delay there was largely caused by, and at the request of, the plaintiff, and yet it was held that he was still in a position to enforce the original contract; so, on principle, where there is, on the part of the vendor only, even such a readiness and willingness as was held sufficient on the part of the vendee in Tyers *v.* The Rosedale, &c. Iron Co., and the delay in the delivery is assented to by the vendee, at the request of the vendor, during the period while the original contract remains intact; there there has been no rescission or variation of the original contract, but a mere forbearance in its performance, and the vendor in such case, on the authority, on principle, of Tyers *v.* The Rosedale, &c. Iron Co., L. R. 10 Ex. 195, will be able to enforce the contract.

public inspection at the time of the defendant's subscription, and the general practice was to deliver them to subscribers at the

Co. the requests for the delay were made by the vendee, and that, as in that case, it was the vendee who was seeking to enforce the contract after the delay, his position was precisely the same as though the request for the delay had been made by the vendor, and it was he who was seeking to enforce the original contract. This is entirely clear. Then, in Tyers *v.* Rosedale, &c. Iron Co. (see the first report L. R. 8 Ex. 305), where the requests of the vendee for delay were continuous during nine of the twelve months in which the iron was to be delivered under the contract, precisely the position was there taken by counsel for the defendant (the vendor) (see L. R. 10 Ex. 197) as was taken by the Common Pleas Division in Plevins *v.* Downing, 1 C. P. Div. 220, 225 *et seq.*, that "the plaintiffs were bound to show that they were ready and willing to receive the iron when it ought to have been delivered." But Blackburn, J.'s, reply to this was: "The answer is, 'We were ready to receive the iron when you were ready to deliver it; but we requested you not to require us to receive it, and you consented.'" And, on the principle that such a readiness and willingness would sustain an averment of readiness and willingness in the declaration to receive the goods under the original written contract, the case of Tyers *v.* Rosedale, &c. Iron Co., L. R. 8 Ex. 305, L. R. 10 Ex. 195, was decided. That case, therefore, which has never been questioned in Hickman *v.* Haynes, L. R. 10 C. P. 598; Plevins *v.* Downing, 1 C. P. Div. 220, or, we think, elsewhere, and which, we think, was unquestionably well decided, shows, with the other cases we have cited, *supra*, that where the action is on the original written contract, with an averment of readiness and willingness to perform it, whether the action be by the vendor or vendee, and whether the request for the delay in the performance be made by the vendor or vendee during the period when the contract remains intact (*a*), and the vendor or vendee, as the case may be, is able to show such a readiness and willingness — the vendor to deliver, or the vendee to receive — as was shown by the vendee, in Tyers *v.* Rosedale, &c. Iron Co., to receive the goods under the original contract, there the vendor or vendee may maintain his action under the original contract. This is clearly the result of Tyers *v.* Rosedale, &c. Iron Co., L. R. 8 Ex. 305, L. R. 10 Ex. 195, connected with Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140, and the other cases.

The deduction, therefore, would clearly be, that, under a contract like that in Tyers *v.* Rosedale Iron Co., if the vendor found it inconvenient for him to deliver the quantities of iron under the contract, at the respective days named in the contract; and, at his request, the vendee consented to defer the delivery, and there was, in fact, as great a readiness and willingness on the part of the vendor to deliver, as there was, in Tyers *v.* Rosedale, &c. Iron Co., on the part of the vendee to receive the iron; in an action by the vendor, under the original contract, against the vendee, for the subsequent non-acceptance of the iron as a substituted performance of the contract, if the defendant were to claim, as was, in effect, claimed in Tyers *v.* Rosedale, &c. Iron Co., L. R. 10 Ex. at p. 197, that "the plaintiff was bound to show that he was ready and willing to deliver the iron when it ought to have been received," the plaintiff could reply, as did Blackburn, J., there, "The answer is, 'I was ready to deliver the iron when you were ready to receive it; but I requested you not to require me to deliver it, and you consented.'"

This, we think, answers the unsound *extra-judicial* reasoning of the court in Plevins *v.* Downing, 1 C. P. Div., at p. 225; the utter unsoundness of which we think is made palpable by "the result of the cases which are summed up in Hickman *v.* Haynes," L. R., 10 C. P., 598; the cases, particularly, of Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140, and Tyers *v.* Rosedale & Ferryhill Iron Co., L. R. 8 Ex. 305; L. R. 10 Ex. 195, being directly opposed to the unsound deduction of the Common Pleas Division in Plevins *v.* Downing, 1 C. P. Div. 220, 225, *et seq.*

We think we have already made this clear by our reference to those cases, but a fuller reference to the latter of them makes this still more apparent. The very egregious error of the Common Pleas Division on this important question seems to make such fuller reference to Tyers *v.* Rosedale, &c. Iron Co., 8 Ex., 305; L. R. 10 Ex. 195, imperative on us. In the latter of these reports, the dissenting judgment of Martin, B., in the former of

(*a*) But see, in Hickman *v.* Haynes, L. R. 10 C. P. at p. 606, where the court, citing Ogle *v.* Lord Vane, and Tyers *v.* Rosedale, &c. Iron Co., does not even make this limitation.

time of their subscription. But the book in which the defendant subscribed his name had only for its title, "Shakespeare Subscrib-

them, is expressly approved, in the plainest and strongest manner possible; Cockburn, C. J., saying: "I think that the true view of the case was taken by the dissenting judge, Baron Martin." And Blackburn, J.: "It is hardly necessary for me to say more than that I entirely agree with the judgment of Baron Martin in the court below." With this view the other judges of the Court of Exchequer Chamber, Mellor, Lush, Brett, and Lindley, JJ., all concurred. The law as laid down by Martin, B., in the case, differs essentially and radically, from what the Common Pleas Division state is "the result of the cases which are summed up in Hickman *v.* Haynes." Martin, B.'s language is: "The second question is one of law, and is a most important one. It arises over and over again every day in the ordinary transactions of mankind. It is this: There is a contract for the sale of goods to be delivered, say in January, or upon a day of January. On the day before the delivery is to take place the *vendor meets the vendee and says*, 'It is not convenient for me to deliver the goods in January, or [illegible] the day named, and I will be obliged will agree that the goods shall be d at a later period,' and the vendee assents; or the vendee goes to the vendor, and says, 'It is not convenient for me to receive the goods in January, or upon the day named, and will you agree that the delivery shall be postponed?' and the vendor assents; the latter is the present case, and the contention on the part of the defendants is that this puts an end to the contract, and that the defendants are not bound to deliver upon the latter day. In my opinion, the contention is not well founded. In the first place, I think it is decided by authority. *It is impossible to distinguish the case of the application for postponement* coming from the vendors, *and one coming from the vendee*, and the case of Ogle *v.* Lord Vane in the Queen's Bench, L. R. 2 Q. B. 275, and in the Exchequer Chamber, L. R. 3 Q. B. 272, has decided that where the postponement took place *at the request of the vendor*, he still continued liable upon the contract. This case, in my opinion, concludes the contention. It was suggested rather than argued, that the right of the plaintiffs to recover was barred by the 17th section of the Statute of Frauds. I think it is not, *assuming* ["assuming," mark! this being important on another point] the legal construction of what took place between the plaintiffs and defendants *to be a contract;* it was not a contract for the sale of goods, which is the contract provided for by this section, but a contract respecting the delivery of goods already sold, which is not within the section at all."

We think it clear, then, that the Common Pleas Division lay down the law correctly, in Plevins *v.* Downing, 1 C. P. Div. at p. 225, where they say: "It is true that a distinction has been pointed out and recognized between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect, in favor of either, to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words, it can be enforced." But we think they are clearly wrong when they allege, as, in effect, they do, that when "the alteration of the period of delivery," or, in other words, "the arrangement as to the mode of performing" the contract, is made or consented to "at the request of the vendor," that that is an alteration of the original contract, and not an arrangement as to the mode of performing it. The authorities, clearly, sustain no such distinction, nor is there anything, in principle, to sustain it; the ground upon which the conclusion, in Plevins *v.* Downing, 1 C. P. Div. at pp. 225, 226, is based, being, as we have shown, an egregious fallacy.

We think it quite immaterial, where, on the one hand, the vendor is seeking to enforce the contract, or, on the other, where it is the vendee who is bringing the action for a breach of the contract, that in the former case the request for the forbearance, or consent to the "arrangement as to the mode of performing" the contract, is made by the vendor, or, in the latter, by the vendee. Their rights and obligations, we think, on principle and authority, are substantially the same; and that, in either case, the action must be on the original contract; and if, as in Tyers *v.* Rosedale, &c. Iron Co., L. R. 10 Ex. 197, the defendants should object that the plaintiffs were bound to show that they were ready and willing to perform the contract at the time named in the writing, the answer of Blackburn, J., there, is equally applicable to the plaintiffs as vendors, as to the plaintiffs as vendees: "We were ready to perform the contract at the time named in the writing, but we requested you not to require us to do so, and you consented."

Far from "the result of the cases which are summed up in Hickman *v.* Haynes," L. R. 10 C. P. 598, being as

ers, their signatures," without any reference to either prospectus, or to the conditions they contained. The court held that as the

stated in Plevins *v.* Downing, 1 C. P. Div. at p. 226; such result is, emphatically, considering the holding in the cases there summed up, the very reverse of that which is so stated as named. The following is "the result" of such cases in Hickman *v.* Haynes, L. R. 10 C. P. at p. 605, as stated in that case itself. Says Lindley, J., in delivering the unanimous judgment of the court: "*The result of these cases* appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the statute of frauds. But so far as this principle has any application to the present case, it appears to us rather to preclude the defendants from setting up an agreement to enlarge the time for delivery in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it. There was, in truth, in this case *no binding agreement* to enlarge the time for delivery. The County Court judge finds that the plaintiff permitted the defendants to postpone, for their own convenience, the acceptance of the iron in dispute, and that the voluntary withholding delivery at the request of the defendants, was usual in the ordinary course of dealings of a similar kind in the iron trade. This finding, in fact, shows that at any time in June *either party could have changed his mind, and required the other to perform the contract according to its original terms:* see Tyers *v.* Rosedale, &c. Iron Co., L. R. 10 Ex. 195, as decided in error, reversing the decision below. L. R. 8 Ex. 305. The distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another, was pointed out and recognized in Ogle *v.* Lord Vane, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272. In that case the plaintiff sued the defendant for not delivering iron pursuant to a written contract, and the plaintiff sought to recover as damages the difference between the contract price, not at the time of the defendant's breach, but at a later time, the plaintiff having been induced to wait by the defendant, and having waited for his convenience. It was contended that the plaintiff was in fact suing for the breach of a new verbal agreement for delivery at a later date than that fixed by the original agreement; but the court held otherwise, and that as the plaintiff had merely forborne to press the defendant, and had not bound himself by any fresh agreement, the plaintiff could sue on the original agreement, and obtain larger damages than he could have obtained if he had not waited to suit the defendant's convenience. Mr. Justice Blackburn (L. R. 2 Q. B. at p. 282) pointed out very clearly the distinction to which we are now adverting, and came to the conclusion that in Ogle *v.* Lord Vane there was no substitution of one contract for another, and that all the parties did was this: 'The plaintiff was willing to wait at the request of the defendant for the defendant's convenience, and he did wait for a long time, till February; but if he had lost patience sooner, and refused to wait longer, he would have had a right to bring his action at once for the breach in July. *It is clearly a case of voluntary waiting, and not of alteration in the contract;* and the length of time can make no difference.' In that case the request for forbearance was made by the vendor after the contract had been broken; in this case the request for time was made by the purchasers both before and after the time for completing the contract had expired; but this distinction does not appear to us to be material (*a*). See Tyers *v.* Rosedale, &c. Ins. Co., L. R. 8 Ex. 305; L. R. 10 Ex. 195. In conclusion, we think that, although the plaintiff assented to the defendants' request not to deliver the 25 tons of iron in question in June, he was in truth ready and willing then to deliver them, *and the defendants are at all events estopped from averring the contrary.* The plaintiff not having bound himself by any valid agreement to give further time, but having for the convenience of the defendants waited for a reasonable time after the [illegible] August 9, to enable the defendants to perform the contract on their part, is entitled on the expiration of that time to treat the contract as broken by the defendants at the end of June, when in truth it was broken." This, we think, with what we have previously written in this note, shows with sufficient clearness what

(*a*) The distinction seems to be material where, for instance, the request is by the vendor after a breach of the contract, and the vendor is seeking to enforce the contract; and equally so where the request has been by the vendee after the breach, and the vendee is bringing an action for the breach of the contract. This is what perhaps misled the court into their [illegible] lacy in Plevins *v.* Downing, 1 C. P. [illegible] p. 225.

subscription book was not internally connected with either of the prospectuses, and as they could not be connected without parol tes-

the law is as authoritatively settled in England, which, of course, does not include that which we have pointed out as a fallacy, contained in the *obiter dictum* of the Common Pleas Division, in the very latest English case on the subject, of Plevins *v.* Downing, 1 C. P. Div. 220, 225.

In this country the impression having been largely entertained that the principle which really governs the decision of Lord Ellenborough in Cuff *v.* Penn, 1 M. & S. 21, had been disapproved and disaffirmed in such cases as Stead *v.* Dawber, 10 A. & E. 57; Goss *v.* Lord Nugent, 5 B. & Ad. 58; Harvey *v.* Grabham, 5 A. & E. 61; Stowell *v.* Robinson, 3 Bing. N. C. 927, and Marshall *v.* Lynn, 6 M. & W. 109, there are numerous *dicta* and decisions in the Federal and in some of the State courts in contravention of the latest English cases, which follow and expressly approve of the principle on which, in effect, Cuff *v.* Penn, 1 M. & S. 21, is sustainable. See Emerson *v.* Slater, 22 How. 28, 42; Swain *v.* Seamens, 9 Wall. 254, 272; Clarke *v.* Russell, 3 Dall. 415; Hasbrouck *v.* Tappen, 15 Johns. 200; Blood *v.* Goodrich, 9 Wend. 68; Stevens *v.* Cooper, 1 Johns. Ch. 429; Williams *v.* Robinson, 73 Me. 186, 195; Kribs *v.* Jones, 44 Md. 396, 408; Organ *v.* Stewart, 60 N. Y. 413, 419; Dana *v.* Hancock, 30 Vt. 616, 619; Espy *v.* Anderson, 14 Pa. St. 308; Blood *v.* Goodrich, 9 Wend. 68, 78; Hasbrouck *v.* Tappen, 15 Johns. 200; Rogers *v.* Atkinson, 1 Ga. 12, 20; Ladd *v.* King, 1 R. I. 224.

But in a great number of cases it has been decided by different State courts in this country, as in Cuff *v.* Penn, 1 M. & S. 21, and as in the latest English cases on the subject, that the parties to a contract required to be in writing under the statute of frauds may vary it as to the mode of performance, or it may be rescinded by parol; and that this, where the action is founded on the original written contract, does *not* contravene the statute. The leading cases, — in some of which regard is not had to the strict rules of pleading, — adopting that which is now the thoroughly established principle of the English courts on the subject, are those decided by the Supreme Court of Massachusetts: Cummings *v.* Arnold, 3 Metc. 486, 490, *et seq.*, where the question is fully investigated; Stearns *v.* Hall, 9 Cush. 31. In this latter case the court say, referring to the decision in Cummings *v.* Arnold, 3 Metc. 486, "The *present* case strongly illustrates the propriety and necessity of the rule thus established. From the evidence in the case it must be assumed that the plaintiff would have paid the money within the time limited in the written contract if the defendant had not orally agreed to substitute another time, and the plaintiff in fact tendered the money within the substituted time. The defendant, therefore, by his own orally agreeing to receive the payment at another substituted time, prevented the plaintiff from making the payment within the time limited in the original contract. Though the plaintiff was ready and offered to make the payment within the substituted time, yet the defendant, notwithstanding his oral agreement, refused to receive the money, and now sets up the non-performance by the plaintiff within the time originally limited, which the defendant himself has by his own act occasioned, as a defence to the plaintiff's claim in this action. This defence cannot be maintained."

The same principle precisely is sustained by the Supreme Court of Pennsylvania in McCombs *v.* McKennan, 2 W. & S. 213, where the question did not come up under the statute of frauds, but in a manner still more important in sustaining the principle of the cases decided under the statute. In McCombs *v.* McKennan, 2 W. & S. 216, the agreement was under seal, with a subsequent parol agreement making a change in the mode of performance of the contract. The action was brought in covenant on the original sealed agreement, and the defendant contended that as the contract had been subsequently varied by the agreement of the parties, the action should have been assumpsit on the new contract, and not covenant on the old one. But the court, in holding otherwise, said: "We think, however, the true principle is stated in the charge of the court, that this was not so much an alteration of the original contract, as a waiver or dispensation on the part of the defendant of certain things to be done by the plaintiff, which were conditions precedent to be performed by him. If the party agrees to accept the thing to be delivered at another time or place than that stipulated, a performance of this by the other party is equivalent to a performance of the original undertaking. It imposes no new duty on the defendant. He merely accepts as performance by the plaintiff that which would not otherwise have been so; and the defendant's liabilities on the original contract remain the same." See, further, Monroe *v.* Perkins, 9 Pick. 297; Lerned *v.* Wannemacher, 91 Mass. (9 Allen) 412, 418; Whittier *v.* Dana, 92 Mass. (10 Allen) 326; Norton *v.* Simonds,

timony, there was no sufficient memorandum of the contract to satisfy the statute.[1]

124 Mass. 19; Low *v.* Treadwell, 12 Me. 441, 444; Blood *v.* Hardy, 15 Me. (3 Shep.) 61; Richardson *v.* Cooper, 25 Me. (12 Shep.) 450; Musselman *v.* Stoner, 31 Pa. St. 265, 270 *et seq.*; Neil *v.* Cheeves, 1 Bail. (S. C.) 537; Buel *v.* Miller, 4 N. H. 196; Grafton Bank *v.* Woodward, 5 N. H. 99, 107; Robinson *v.* Batchelder, 4 N. H. 40; Negley *v.* Jeffers, 28 Ohio St. 90; Bever *v.* Butler, Wright (Ohio), 367; Reed *v.* McGraw, 5 Ohio, 376; Bethel *v.* Woodworth, 11 Ohio St. 393; Keating *v.* Price, 1 Johns. Cas. 22; Fleming *v.* Gilbert, 3 Johns. 528; Bailey *v.* Johnson, 9 Cow. 115, 118; Trumbo *v.* Cartright, 1 Marsh. (Ky.), 582; Massy *v.* Mead, 2 Mill. (La.) 157; Benson *v.* Smith, *Ib.* 103; Perrine *v.* Cheeseman, 6 Halst. 174; Long *v.* Hartwell, 34 N. J. Law, 116, 125, *et seq.*; Lattimore *v.* Harsen, 14 Johns. 330; Blanchard *v.* Trim, 38 N. Y. 225, 227; Franklin *v.* Long, 7 Gill & J. (Md.) 407, 417; Watkins *v.* Hodges, 6 Harr. & J. (Md.) 38, 45; Bryan *v.* Hunt, 4 Sneed (Tenn.), 543.

[1] Le Blanc, J., in dealing with the question, said: "The evidence is that the defendant subscribed a book entitled 'Shakespeare's Subscribers, their Signatures.' If there had been anything in that book which had referred to the particular prospectus, that would have been sufficient; if the title to the book had been the same with that of the prospectus, it might, perhaps, have done. But as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time to which the signature related. The case, therefore, falls directly within the statute of frauds." And Lord Ellenborough, C. J.: "I cannot connect the subscription of the *defendants* [*plaintiffs* is in the text, but this is clearly an error] in the book with the prospectus; nor does defendants' letter refer to the prospectus produced at the trial. It speaks, indeed, of his *engagement* with the proprietors of the Boydell Shakspeare; but it cannot be shown to be the engagement contained in the particular prospectus without parol evidence, which the statute excludes. If there had been a plain reference to the particular prospectus, that might have helped the plaintiff; but there is nothing of that kind." Boydell *v.* Drummond, 11 East, 157, 158.

In Western *v.* Russell, 3 Ves. & B. 187, a letter in the third person was written by the defendant to the plaintiff, offering to sell to the latter "the Watering Farm" for £4700, and a few days later the defendant wrote another letter to the plaintiff acknowledging receipt of a letter from the plaintiff accepting the defendant's offer. In a suit for a specific performance of the contract, it was held that the defendants' two letters, coupled together, amounted to an agreement, signed by the party to be charged, within the 4th section of the statute. And see Coles *v.* Trecothick, 9 Ves. 234; Acton *v.* Acton, Prec. Ch. 237; Bawdes *v.* Amhurst, Prec. Ch. 402; Huddlestone *v.* Briscoe, 11 Ves. 583; Blagden *v.* Bradbear, 12 Ves. 466; Maxwell *v.* Montacute, Prec. Ch. 526; Taylor *v.* Beech, 1 Ves. Sen. 297; Smith *v.* Watson, Bunb. 55; Montacue *v.* Maxwell, 1 Str. 235; Luders *v.* Anstey, 4 Ves. 501; Hodgson *v.* Hutchenson, 5 Vin. Ab. 522, pl. 34; De Beil *v.* Thomson, 3 Beav. 469.

A letter, signed by the purchaser, not containing the terms of the contract, but, on a fair view of the evidence, referring, though not in terms, to a memorandum containing them, was held sufficient within the statute. Morgan *v.* Halford, 1 Sm. & G. 101. But a memorandum that A. had paid to B. £50 as a deposit in part payment of £1000, for the purchase of a house, the terms to be expressed in an agreement to be signed as soon as prepared, was held not a sufficient agreement in writing to satisfy the statute. Wood *v.* Midgley, 5 De G. M. & G. 41. In Verlander *v.* Codd, 1 T. & R. 352, where the defendant, in one letter, wrote to the plaintiff: "I will grant you the extension of lease you solicit," on premises named, at £50 a year, and in a subsequent letter named the time when the lease was to expire, the court held that the letters connected, signed by the defendant, furnished written evidence of all the essentials of the agreement, the phrase "extension of lease," used by a person who knew the actual situation of the property and the interests of the parties in it, being free from ambiguity, as it must refer to the end of the term granted by the subsisting lease, and, therefore, fixed the time when the extension of the lease was to begin.

The principle of Hinde *v.* Whitehouse, 7 East, 558, was acted upon in Kenworthy *v.* Schofield, 2 B. & C. 945. There, on a sale of goods by auction, certain conditions of sale were read before the bidding commenced, but the conditions were not attached to the catalogue. An agent for the defendant was the highest bidder for a lot, and the auctioneer put down the

In Cooper *v.* Smith[1] there was a memorandum of a sale of flour to the defendant, made by the plaintiff's agent, in the plaintiff's order book, which was read over by the plaintiff's agent to the defendant, but which was not signed. In an action against the defendant for the price, it was sought to take the case out of the statute by a letter from the defendant to the plaintiff. The letter stated the contract differently from that which was relied upon by the plaintiff, and claimed not to be bound by the contract on the ground that it had not been performed by the plaintiff. On the trial the jury found that the contract between the parties was as claimed by the plaintiff, the question of law being reserved for the full court. On motion to set aside the verdict and enter a nonsuit, the court held that the plaintiff could not avail himself of the letter as evidence of the contract for one purpose, to bind the defendant within the statute, and renounce it for another purpose, but that the letter must be taken in its entirety, and then, as the letter referred to a different contract from that proved on the part of the plaintiff, it falsified the contract proved by parol testimony, instead of being a recognition of the same contract, and put the plaintiff out of court.[2]

price, £105, and the agent's name opposite that lot in his catalogue. The court held that no sufficient memorandum of the bargain was signed to satisfy the statute, the conditions of sale not being annexed to the catalogue. Holroyd, J., in his judgment, said: "It appears to me that you cannot call that a memorandum of a bargain which does not contain the terms of it. The argument for the plaintiff is, that the conditions being in the room were virtually attached to the catalogue. But I think that as they were not actually attached or clearly referred to, they formed no part of the thing signed. In the case put of a separation of the conditions from the catalogue, during the progress of the sale, I should say that the signatures to the latter, made after the separation, were unavailing. It occurred to me at first, that this might be likened to the case of a will, consisting of several detached sheets, when a signature of the last, the whole being on the table at the time, would be considered a signing of the whole; but there the sheet signed is a part of the whole. Here the catalogue was altogether independent of the conditions."

In an old Irish case (Boyce *v.* Greene, Batty, 608, A. D. 1826), it was held under the Irish statute of frauds, 7 Wm. 3, c. 12, § 2, *Ir.*, that a memorandum of a contract signed by the defendant, which did not contain the names of both the parties to the contract, was insufficient; and that a second document, signed by the defendant, mentioning both the names, but not referring to the memorandum of contract, and differing with it in some respects, could not be connected with it nor called in aid of it.

[1] 15 East, 103.

Cooper *v.* Smith, 15 East, 103, was affirmed, and followed in Richards *v.* Porter, 6 B. & C. 437. In this case the plaintiffs sent an invoice of five pockets of hops to the defendant, on Jan. 25, describing the plaintiffs as sellers, and the defendant as purchaser of the hops, and delivered the hops the same day to the carriers, to be conveyed to the defendant, informing the defendant at the same time that they were so forwarded. The defendant wrote the plaintiffs, on Feb. 27, the following letter, which was relied on to take the case out of the statute: "The hops (five pockets) which I bought of Mr. Richards on the 23rd of last month are not yet arrived, nor have I heard of them. I received the invoice. The last was much longer than they ought to have been on the road; however, if they do not arrive in a few days, I must get some elsewhere, and, consequently, cannot accept them." In an action for the price of the hops, before Vaughan, B., the plaintiff was nonsuited; which was sustained by the full court, Lord Tenterden, C. J., in delivering the judgment of the court, saying: "I think this letter is not a suffi-

In Saunderson *v.* Jackson,[1] which was an action for the non-delivery of goods, a bill of parcels was delivered to the plaintiff

cient note or memorandum in writing of the contract to satisfy the statute of frauds. Even connecting it with the invoice it is imperfect. If we were to decide that this was a sufficient note in writing, we should in effect hold, that if a man were to write and say, 'I have received your invoice, but I insist upon it the hops have not been sent in time,' that would be a note or memorandum in writing of the contract sufficient to satisfy the statute. I think the case of Cooper *v.* Smith, 15 East, 103, in substance, is not distinguishable from this case." So, in Smith *v.* Surman, 9 B. & C. 561, where the plaintiff's attorney by letter required the defendant to pay for timber the plaintiff had sold the defendant by oral contract, and the defendant wrote a letter in answer, stating that he had bought the timber, but that it was to be sound and good, adding, "which I have some doubts whether it is or not, but he promised to make it so, and now denies it. When I saw him he told me I should not have any without all, so we agreed on these terms, and I expected him to sell it to somebody else." The court held that there was no sufficient memorandum of the contract to satisfy the statute. Bayley, J., thus dealt with the question: "But it is said that the defendant has recognized in writing the contract stated in the letter of the plaintiff's attorney. I agree that if there had been a letter written by the seller, or his agent, to the buyer, specifying the terms of a contract, and the buyer in his answer had recognized that contract, there would have been a note in writing of the bargain sufficient to satisfy the statute. But the defendant in this case does not recognize the contract stated in the letter of the plaintiff's attorney. The contract as described in the two letters differs essentially as to the quality of the things to be sold. In the letter of the plaintiff's attorney, the contract is spoken of as one for the absolute purchase of trees at 1*s.* 6*d.* per foot, without reference to quality; the defendant says, that it was part of the contract that the timber should be sound and good; that Mr. Smith denied it, and refused to let him have part without all, and that he had expected he would have sold it again. It is clear, therefore, that the vendee did not consider it a binding bargain. What the real terms of the contract were is left in doubt, and must be ascertained by verbal testimony. The object of the statute was that the note in writing should exclude all doubt as to the terms of the contract, and that object is not satisfied by the defendant's letter." See Seagoode *v.* Meale, Prec. Ch. 560; Clerk *v.* Wright, 1 Atk. 12; Ayliff *v.* Tracy, 2 P. Wms. 64.

In Archer *v.* Baines, 5 Ex. 625, the defendant verbally agreed to purchase a quantity of flour from the plaintiff. After the receipt of the flour by the defendant, he wrote the plaintiff that the flour was not that which he had bought, and that he would not have it. The plaintiff wrote in reply, that the flour was that which the defendant had bought, and enclosed him the invoice. The defendant, in answer to this letter, repeated his denial that the flour he had received was that which he had purchased. The court held, sustaining a nonsuit, that the case was governed by Richards *v.* Porter, 6 B. & C. 437. Alderson, B., in delivering the judgment, said: "No doubt, if the letter of the plaintiff and of the defendant in answer, taken together, contained a sufficient contract, namely, one that would express all its terms, they would constitute a memorandum in writing within the statute. We have no difficulty, therefore, in coming to the conclusion that these letters may be looked at for the purpose of seeing whether or not they contain a sufficient contract to take the case out of the statute; but looking at them, we do not think they do. They do not express all the terms of the contract; and the case is in truth governed by Richards *v.* Porter, 6 B. & C. 437, in which Lord Tenterden gave a similar decision as to a document of a similar nature which was then before him. There is a distinct refusal on the part of the defendant to accept the flour which he had bought of the plaintiff. It is clear from the letters that he had bought the flour from the plaintiff upon some contract or other, but whether he bought it on a contract to take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a particular sample which had been delivered to him, on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties is not settled by the contract in writing." But in Bailey *v.* Sweeting, 9 C. B. N. S. 843, the defendant, in reply to a letter from the plaintiffs, wrote: "I beg to say that the only parcel of goods selected for ready money was the chimney glasses, amounting to £38 10*s.*

[1] 2 B. & P. 238.

at the time he gave the defendants the order for the goods. The bill of parcels was not signed by the defendants, but it referred to the goods as being "bought of Jackson and Haukin" (the defendants). The court held that, although this might not amount to a signing of the memorandum to satisfy the statute, a letter signed by the defendants, referring to their execution of the plaintiff's order, was sufficiently connected with the bill of parcels to make the two constitute a sufficient signed memorandum to satisfy the statute.[1] So, in Allen *v.* Bennet[2] it was held that an order for

6*d.*, which goods I have never received, and have long since declined to have, for reasons made known to you at the time." The defendant's reason for refusing to receive the glasses was nothing in the nature of a denial of the contract, but was because they had been damaged by the carrier before reaching their destination. In an action for the price, the plaintiffs relied on the defendant's letter to take the case out of the statute. The court held that as the defendant's letter recited all the essential terms of the bargain, it was a sufficient memorandum of the contract to take the case out of the statute, although the letter also contained a statement, in effect, that he did not consider himself in law liable for the performance of the contract. See Shippey *v.* Dennison, 5 Esp. 190, where an indorsement on a paper, intended by the party as the means of getting clear of a contract, was held, by Lord Ellenborough, to be a sufficient note of an agreement to satisfy the statute.

In Wilkinson *v.* Evans, L. R. 1 C. P. 407, the defendant had verbally ordered of the plaintiff a quantity of cheese and candles. The defendant refused to take the goods when they arrived, and returned the invoice to the plaintiff, having written a note on it, which he signed, containing the following language, — "The cheese came to day, but I did not take them in, for they were very badly crushed; so the candles and cheese are returned." In a letter to the plaintiff's attorney, the defendant referred to the goods, thus: "Had they been sent by canal as I ordered them." The defendant, in an action for the price of the goods, relied on the statute. The court held that the above constituted a sufficient note or memorandum of the contract.

[1] In Hodges *v.* Horsfall, 1 Russ. & Myl. 116, it was decided that where an agreement expressly refers to a plan as an existing document, forming a term in the contract, parol evidence is admissible for the purpose of identifying the plan; but unless the evidence of identity is clear and satisfactory, specific performance of such an agreement will be refused. And in this case, where there were several plans, and it was doubtful to which of these the parties referred, Lord Lyndhurst, affirming the judgment of Lord Gifford, held that the evidence was not sufficiently clear to identify the particular plan, and specific performance of the agreement was refused.

The question arose in Shortrede *v.* Cheek, 1 A. & E. 57, as to the identification of a promissory note, referred to in a written promise to pay the debt of another, in order to show that the consideration sufficiently appeared by the writing, to satisfy the statute. The action was on the following guarantee, given by the defendant to the plaintiff: "You will be so good as to withdraw the promissory note; and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole £45." There was also another letter from the defendant to the plaintiff, of a later date, in which he acknowledged himself under obligation to discharge the £45 due from his son, with interest, without delay. At the trial before Lord Denman, C. J., the plaintiff gave in evidence the promissory note of the defendant's son for £35, and the jury found that this was the promissory note which was referred to in the defendant's guarantee, and gave a verdict for the plaintiff, which was sustained by the full court. Parke, J., thus clearly dealt with the question involved: "I am of opinion that there is in this case a sufficient statement of the consideration. The defendant, by his letter, requests the plaintiff to withdraw some promissory note which is in his possession, and promises, on his doing so, to pay the amount, together with that of a memorandum given by his son, at Christmas. There is no doubt that the giving up of any note upon which the plaintiff might have sued, would be a sufficient consideration. Then, the consideration being executory, the

[1] 3 Taunt. 168.

goods written and signed by the seller in a book of the buyers, but not naming the buyers, might be connected with a letter of the seller to his agent mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming the performance of the order, to constitute a complete contract within the Statute of Frauds. And in Jackson *v.* Lowe,[1] which was an action brought to recover damages for the non-performance of a contract for the sale and delivery of a quantity of flour, the letter of the purchaser, containing the particulars of the contract, was answered by a letter from the defendants, in which they referred to the contract, alleged its part-performance, and stated their readiness to complete it. The jury having found for the plaintiff, the court held that the letters were sufficiently connected to supply the memorandum to satisfy the statute; Park, J., saying: "It is admitted that two distinct writings may be coupled together and constitute a memorandum within the intention of the statute. The question therefore is, whether the jury were not warranted in concluding there was in this case a sufficient note in writing. The writing must clearly refer to the contract, which is the ground of action; but how can there be a clearer reference than in the defendant's letter? The notice contains an assertion of the contract, specifying the quantity, quality, and price of the flour, and to this contract the answer most clearly refers, disputing none of the terms of it, nor mentioning any other terms, but asserting a part performance."

In Dobell *v.* Hutchinson[2] the purchaser of lands by auction signed a memorandum of the contract, indorsed on the particulars and conditions of sale, and referring to them. Afterwards he wrote to the vendors, complaining of a defect in the title, re-

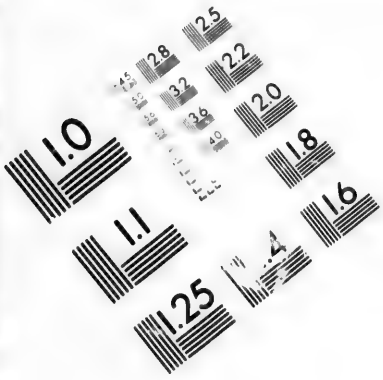
plaintiff is to show that he has fulfilled it, and, for that purpose, must of necessity prove by parol evidence that the note withdrawn by him was the thing meant by the agreement. If it had appeared in proof that there were two notes to which the promise might have applied, there might have been a difficulty as to explaining this by parol testimony. But when the evidence is given of one note only, it becomes perfectly clear that the plaintiff has complied with his part of the agreement." Again. Parke, J.: "Suppose, instead of 'the promissory note,' it had been 'the hogshead of tobacco in your possession,' must it have been described by marks and numbers?" Lord Denman: "Or, 'the corn you sold my son,' must it have been shown what corn it was?" Parke, J.: "Even if the note had been fully described, you might say that it was possible there might have been another note, and that the contrary should have been shown." Lord Denman, C. J.: "There would be no end to such a course of objection. It might be said that the plaintiff perhaps had another son, and that the letter did not show what son was meant." Littledale, J.: "I think there was a sufficient consideration stated, within the statute. It is true the letter leaves it uncertain what the note was, and whether it was a note of the father or of the son; and if it had appeared that there were two notes, one given by each, I do not think parol evidence could have been received to show which was meant. So if there had been two notes in question for the same sum, but of different dates. But when upon the evidence only one note appears to be in question, no such explanation is necessary, and the statement in writing is quite sufficient."

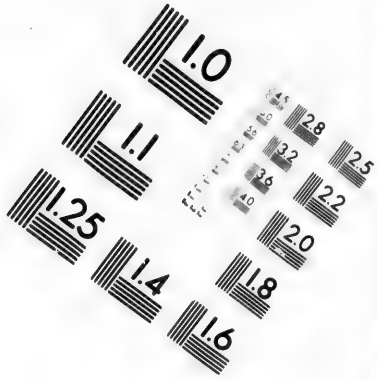
[1] 1 Bing. 9.

[2] 3 A. & E. 355.

ferring to the contract expressly, and renouncing it. The vendors wrote and signed several letters, mentioning the property sold, the names of the parties, and some of the conditions of sale, insisting on one of them as curing the defect, and demanding the execution of the contract. It was held, that these letters might be connected with the particulars and conditions of sale, so as to constitute a memorandum in writing, binding the vendors under the statute, although neither the original conditions and particulars, nor the memorandum signed by the purchaser, mentioned, or was signed by, the vendors. The court, in this case, after referring to the facts, said: "The cases on this subject are not at first sight uniform; but, on examination, it will be found that they establish this principle, that where a contract in writing or note exists which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them. Here the letters of the defendants refer expressly and distinctly to the conditions of sale, and they had in their hands, or the hands of their auctioneer, at that very time, the conditions of sale signed by the plaintiff, to which reference is made, so that no parol evidence of any kind was requisite to show a contract binding both parties, except evidence of the handwriting of each, which must be adduced in all cases." [1]

[1] In delivering the judgment of the court in Dobell *v.* Hutchinson, 3 A. & E. 355, 371, Lord Denman, C. J., made the following review of the authorities: "In the case of Boydell *v.* Drummond, 11 East, 142, the book signed by the defendant did not refer to any prospectus or contract. In Richards *v.* Porter, 6 B. & C. 437, the letter of the buyer referring to the invoice sent by the seller expressly repudiated the contract. In Champion *v.* Plummer, 1 B. & P. N. R. 252, a memorandum signed by the seller only was held insufficient to charge even him, because the buyer's name did not appear on it, or on any other paper to which it referred. In Wheeler *v.* Collier, M. & M. 123, the same circumstance occurred, namely, that the seller's name did not appear on the conditions of sale signed by the buyer; and Lord Tenterden thought that the seller could not sue; but the case was decided on another point. On the other hand, the cases of Saunderson *v.* Jackson, 3 Taunt. 169; Allen *v.* Bennet, 2 B. & P. 238; and Jackson *v.* Lowe, 1 Bing. 9, show clearly that a subsequent letter may be a sufficient note to bind the writer, where the requisites above mentioned are found, even where it is after a dispute has arisen." In Johnson *v.* Dodgson, 2 M. & W. 653, which was a case of the purchase by the defendant from the plaintiffs of a quantity of hops, the memorandum named, as the subject of the purchase, "27 pockets Playsted, 1836, Sussex, at 103*s.*; 4 pockets Selme, Beckley, at 95*s.*" The defendant, the same day on which the purchase was made, wrote the plaintiffs as follows: "Please to deliver the 27 pockets of Playsted, and the 4 pockets Selmes, 1836, to Mr. Robert Pearson or bearer; 20 pockets of Playsted to be forwarded *per* first ship, and the remaining eleven pockets *per* second ship." It was held that the memorandum, independent of the letter, satisfied the statute; but, on the question as to the sufficient recognition of the contract by the letter, Lord Abinger, C. B., considered it a matter of some doubt, although his inclination was that the reference in the letter being to the only contract proved in the case was sufficient, and Bolland, B.'s, opinion inclined the same way. But Parke, B., said: "If the question turned on the recognition by the subsequent letter, I own I should have had very considerable doubt whether it referred sufficiently to the contract; it refers to the subject-matter, but not to the specific contract." See Lobb *v.* Stanley, 5 Q. B. 574, where it was held that parol evidence was admissible under





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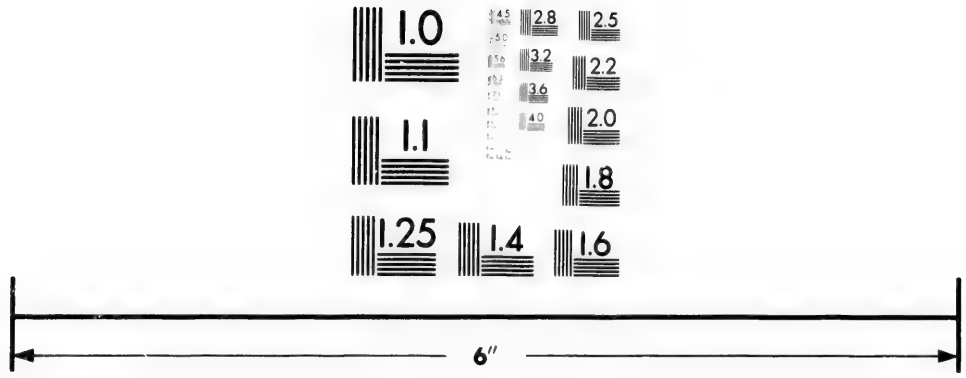

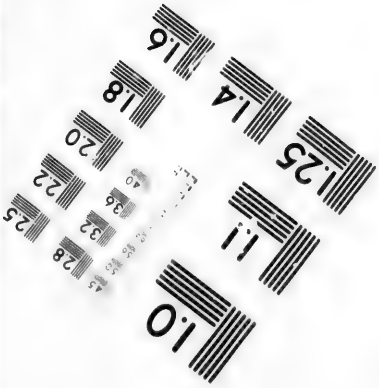

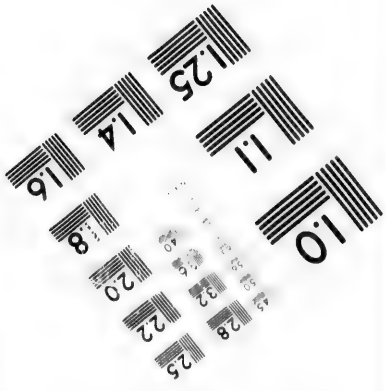

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The doctrine in the matter was laid down generally by Lord Cranworth, L. C., in Ridgway *v.* Wharton,[1] that if there is an agreement to do something, not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, parol evidence may be admitted to show what that writing is, so that the two taken together may constitute a binding agreement within the Statute of Frauds.[2] While the correct-

6 Geo. 4, c. 16, § 131, to show the amount of an account, the certificated bankrupt having given a written promise to pay "the amount of Mr. Stanley's account." In Jacob *v.* Kirk, 2 M. & Rob. 221, the defendant bought from the plaintiff a quantity of cigars, on July 3, and signed, and gave to the plaintiff, the following memorandum: "Mr. Kirk, 6 doz. King's, 6 doz. Queen's, at 25*s.* *per* lb.; 2 doz. others at 20*s.* *per* lb.; to *Russell Street, Manchester*." The plaintiff's name not appearing in the memorandum, in an action for the price of the cigars the plaintiff relied, to supply the defect in the memorandum, upon a letter written by the defendant to the plaintiff in August following, stating that he had received a letter from the plaintiff, "that he was surprised at the plaintiff's expecting him to accept the cigars, which, instead of having been sent in nine or ten days, had not arrived in *Manchester* till the 10th of August;" that he therefore should not think of accepting them, and referred the plaintiff to his, the defendant's solicitor. No reference was made in the letter to the memorandum. On the trial, before Parke, B., it was held that the objection of the statute of frauds was fatal; Parke, B., saying: "My opinion is, that the letter ought clearly to refer to the memorandum; and that the whole mischief intended to be guarded against by the statute would be incurred if verbal evidence were admitted to show that the documents must necessarily be presumed to refer to each other." The defendant having obtained a verdict on the issue as to the non-delivery of the cigars within a reasonable time, also, by direction of Parke, B., took a verdict on the plea of the statute. See Peek *v.* North Staffordshire Ry. Co., 10 H. L. Cas. 473, 568 *et seq.*, as to the application of the same principle to a contract limiting the liability of a railway company under 17 & 18 Vic., c. 31, § 7.

In McDonald *v.* Longbottom, 5 Jur. N. S. 1102; 1 E. & E. 977, 987; a conversation between one of the plaintiffs and the defendant's agent took place with reference to a quantity of wool, which the plaintiffs offered for sale to the defendant. Subsequently the defendant's agent wrote to the plaintiffs making them an offer for their wool, speaking of it as "your wool." The plaintiffs accepted the offer. The court held that, for the purpose of identifying the subject of the contract, and to show what was meant by "your wool," parol evidence was admissible of the conversation which had taken place prior to the letters having been written. Lord Campbell, C. J., said: "An offer of 16*s.* *per* stone for 'your wool,' to be delivered in Liverpool, was made to the plaintiffs, and that offer was accepted by them; and that contract was in writing. I am of opinion that where there is a contract for the sale of a specific subject, parol evidence may be received to show what the nature of that subject was; and for that purpose any fact may be proved which was within the knowledge of both parties at the time the contract was made. In this case it was proposed to prove the conversation between one of the plaintiffs and Stewart, the agent of the defendant, in which it was mentioned that the defendant had wool coming from his own flock, and that it was to be disposed of, and also that he had contracted for the purchase of other wool; and with this knowledge the contract is made. There was an offer to the plaintiffs to buy 'your wool,' and that offer was accepted; that specific subject-matter is to be sold at 16*s.* *per* stone, to be delivered at Liverpool. There is no difficulty in admitting in evidence what passed between the plaintiffs and the defendant's agent before the letter was written. It does not add to or vary the written contract, and it is no part of the contract, but enables us to say what the contract refers to." See Sarl *v.* Bourdillon, 1 C. B. N. S. 188; Smith *v.* Jeffreys, 15 M. & W. 561; Sotilichos *v.* Kemp, 3 Ex. 105; Panford *v.* Raikes, 1 Mer. 646, 653; Humphrey *v.* Dale, 7 El. & Bl. 267, 275; 3 Jur. N. S. 213, 215; 5 Jur. N. S. 191; Vandenburgh *v.* Spooner, L. R. 1 Ex. 316; Spicer *v.* Cooper, 1 Q. B. 424; Williams *v.* Lake, 2 E. & E. 349.

[1] 6 H. L. Cas. 238, 257.

[2] The difficulty in applying this rule is shown by the case of Ridgway *v.* Wharton, 6 H. L. Cas. 238, itself. In this case it was first held by Vice-Chancellor

ness of this proposition was conceded by the other Law Lords sitting in Ridgway *v.* Wharton, it is evident that great differences

Stuart that the correspondence between the plaintiff and the defendant's agent, connected with written instructions, setting forth the terms of a lease, showed a contract between the parties, and took the case out of the statute. On appeal, this decision was reversed by Lord Cranworth, L. C. (Ridgway *v.* Wharton, 3 De G. M. & G. 677), who held that the facts showed a contract agreed upon between the plaintiff and the defendant's agent; but that there was not a sufficient note in writing to satisfy the statute. But the bill was dismissed without costs. On appeal to the House of Lords (Ridgway *v.* Wharton, 6 H. L. Cas. 238) Lord Cranworth entirely changed his opinion, and held, on the authority of Allen & Bennet, 3 Taunt. 169, and Dobell *v.* Hutchinson, 3 A. & E. 355, that if the facts showed a contract, there was sufficient memoranda of it to take the case out of the statute; but that the facts neither made out an agency in the party signing for the defendant, nor, assuming such agency, did they make out a contract. Lord St. Leonards, however, delivered a masterly judgment, agreeing with Lord Cranworth, Lord Brougham, and Lord Wensleydale, that, assuming the agency and that there was a contract, the evidence was sufficient to satisfy the statute; but, against the prevailing view, Lord St. Leonards expressed a very strong opinion that the agency was established, and that the terms of a concluded contract had been agreed upon between the parties. Lord Brougham was of the opinion that the agency was not made out, but had more doubt whether, assuming the agency, the writings did not, in effect, show a concluded agreement. Lord Wensleydale held with Lord Cranworth, in his changed opinion, on all three grounds, but rested his view largely on the fact that as the correspondence, to fix the signing, had reference to instructions for a lease, which instructions might be departed from or added to in preparing the lease itself; therefore the instructions, assuming them to have been agreed upon between the parties, with the correspondence, did not show a contract between the parties. As the gist of Lord St. Leonards' very able decision is, that the instructions embodied all the terms which the parties had agreed to, and showed a completed contract, it is more than doubtful whether the reasoning of Lord St. Leonards is, on that point, met by the view of Lord Wensleydale and the ground on which it is based. If so, then the cases which have decided that signed instructions for a lease, setting out the essential terms of a lease, may clearly be treated as an agreement for a lease, and satisfy the statute of frauds, are overthrown; which we scarcely think is the case. See Verlander *v.* Codd, Tur. & Russ. 352; Western *v.* Russell, 3 Ves. & B. 187; Thomas *v.* Dering, 1 Keen, 729; Gibbins *v.* The Board of the Metropolitan Asylum, 11 Beav. 1.

The majority of the Law Lords sitting in Ridgway *v.* Wharton, 6 H. L. Cas. 238, rested their view largely, as to whether there was an agreement concluded upon between the parties, on the opinion of Lord Redesdale, in Clinan *v.* Cooke, 1 Sch. & Lef. 22, 33, of the decision of Lord Thurlow, in Tawney *v.* Crowther, 3 Br. Ch. Cas. 161, 318. Lord Redesdale, in expressing doubt as to whether Tawney *v.* Crowther was well decided, intimated that Lord Thurlow was himself in doubt as to his decision, and that he had manifested this doubt by allowing the defendant his costs, although he had been decided to be in the wrong. Lord Redesdale seems to have been in error on both points. The case came up first in July 1790, when Lord Thurlow overruled the plea of the Statute of Frauds, holding that a letter signed by the defendant, in answer to one from the plaintiff's attorney, wishing "the agreement to be signed," sufficiently referred to the agreement which had been prepared, and which remained in the defendant's custody. The question came up a year later on the hearing, when Lord Thurlow not only adhered to his previous decision, but, according to the report of the case in 3 Br. Ch. Cas. 319 *et seq.*, gave excellent reasons for doing so, and, we think, laid down principles of law of undoubted soundness. See *supra*, p. 628 n. On the question of costs, too, Lord Redesdale seems to have been in error, and was probably misled by the fact, that, in Tawney *v.* Crowther, there were two defendants, Crowther, and the plaintiff's own attorney, one Morrell; to the latter of whom, and not to the wrong-doer, Crowther, were costs allowed. See Tawney *v.* Crowther and another, 3 Br. Ch. Cas. 161, and Forster *v.* Hale, 3 Ves. 696, following Tawney *v.* Crowther, 3 Br. C. C. 161, 318. See Mr. Hovenden's note to Forster *v.* Hale, 3 Ves. 713, intimating that as, contrary to the opinion of Lord Redesdale, costs were not given to the wrong-doing defendant, in Tawney *v.* Crowther, 3 Br. C. C. 318, "Lord Redesdale's inference, that Lord Thurlow felt diffident of his opinion in that case, must

will arise in its application in doubtful cases. As will be seen by the cases we have stated the doubt generally arises from the un-

fall, together with the premises upon which it was built."

Lord St. Leonards in Ridgway *v.* Wharton, 6 H. L. Cas. at p. 293, expressed the opinion, with reference to the language of the defendant in his letter to the plaintiff's attorney, in Tawney *v.* Crowther, 3 Br. C. C. 161, 318, that "one man might think that those words were sufficient, and another man might think they were not." While this, as well as the principal case we have been considering, shows how difficult the application of the law on this subject often is, we are of the opinion that the construction put by Lord Thurlow in Tawney *v.* Crowther, 3 Br. C. C. 161, 318, in the light of the surrounding circumstances, is much more reasonable than that of Lord Redesdale, on the same language, in his comments on it in Clinan *v.* Cooke, 1 Sch. & Lef. at p. 34. On the question of costs, it is noteworthy that in Ridgway *v.* Wharton, 3 De G. M. & G. 677; 6 H. L. Cas. 238, although the decision of Vice-Chancellor Stuart was reversed, and although the appeal to the House of Lords was dismissed, both the reversal of the decree and the dismissal of the appeal were without costs.

A contrariety of opinion similar to that which characterizes Ridgway *v.* Wharton, 3 De G. M. & G. 677; 6 H. L. Cas. 238, is also to be found, on the same subject, in Fitzmaurice *v.* Bayley, 6 E. & B. 868; 8 E. & B. 664; 9 H. L. Cas. 78. In this latter case, there was a complete accord in opinion as to the doctrine applicable to the case, that, if there be an agreement in writing between the parties it is not necessary that it should be in one paper, but that it may be collected from many, provided they are connected by internal evidence. The opinion which ultimately prevailed, although not with perfect unanimity (Lord Campbell and Wightman, J., being of a different opinion from the majority), was, that the writings did not show a completed contract. The ground taken in this case would seem to be more reasonable than in that of Ridgway *v.* Wharton, as in this latter case the effect of the decision was, that although all the essential terms of the contract were stated in the writings, — letters and instructions, — yet that as, in preparing the formal contract under the instructions, the instructions might possibly be departed from, and new terms be added, therefore the writings did not show a completed contract. But in Fitzmaurice *v.* Bayley, 9 H. L. Cas. 78, the more tenable ground, in principle, was taken, that the writings did not show all the essentials of the contract, the writings being silent as to an absolutely necessary ingredient to make a contract with reference to one of the subjects of the negotiations between the parties. See Hammersley *v.* De Biel, 12 Cl. & F. 45.

In Shippey *v.* Dennison, 5 Esp. 190, where a party had entered into a parol agreement for a lease, and a draft of it was prepared, Lord Ellenborough held, that though the agreement was void under the statute, yet by an indorsement on the draft, where the party in effect said, that he was unable to perform the agreement, the agreement was sufficiently proved to satisfy the statute.

In Morris *v.* Wilson, 5 Jur. N. S. 168, where there was a memorandum in writing which was referred to in another memorandum, the latter of which was signed by the party to be charged, the two combined making a contract; it was held that parol evidence was admissible to identify the first memorandum as that which was referred to by the party to be charged. And see Shortrede *v.* Cheek, 1 A. & E. 57; Warner *v.* Wellington, 3 Drew. 523; Jacobs *v.* Kirk, 2 Moo. & R. 221; Smith *v.* Surman, 9 B. & C. 569; Hodges *v.* Horsfall, 1 Russ. & M. 116.

Where a letter was written, signed by the defendant, in which he says: "I have this day sold the house, &c., in Newport, to O. (the plaintiff), for 1000 guineas, the money to be paid as soon as the deeds can be had from D.," it was held, on the doctrine *id certum est quod certum reddi potest*, that the deed referred to could be looked to for the purpose of identifying the house. Owen *v.* Thomas, 3 My. & K. 353.

In Jones *v.* The Victoria Graving Dock Co., 2 Q. B. Div. 314, where a draft agreement, and a paper modifying it, were agreed upon between the parties, and a resolution entered on the minutes of the defendants, the parties to be charged, was signed by the defendants' chairman for the purpose of verifying the accuracy of the entry, the entry stating that the agreement was as in the draft and in the paper modifying it; it was held, in an action to enforce the contract against the defendants, that the statute was satisfied, although it was the intention of the defendants that the contract as agreed upon should have been afterwards duly engrossed and executed; and, following Ridgway *v.* Wharton, 6 H. L. Cas. 238, that parol evidence was ad-

certainty existing whether in the particular case the documents are sufficiently connected by internal reference to amount to the signing of a memorandum to satisfy the statute, the function of the parol evidence being merely to identify the papers referred to and relied upon for that purpose.[3]

missible to identify the draft agreement, and the paper modifying it.

In Brogden *v.* Metropolitan Ry. Co., L. R. 2 App. Cas. 666, 672, where the question came up analogous to that which was decided in Dunlop *v.* Higgins, 1 H. L. Cas. 38; in Ridgway *v.* Wharton, 6 H. L. Cas. 238, and in kindred cases, Lord Cairns, L. C., said: "There are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has been really constituted between the parties. But, on the other hand, there is no principle of law better established than this, that even although parties may intend to have their agreement expressed in the most solemn and complete form that conveyancers and solicitors are able to prepare, still there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or other documents, I mean imperfect and incomplete as regards form." In this case the facts were that the appellants had for some years supplied the respondents with coals. At last it was suggested by the appellants that a contract should be entered into between them. After their agents had met together, the terms of agreement were drawn up by the agents of the respondents and sent to the appellants, who filled up certain parts of it which had been left in blank, and introduced the name of the gentleman who was to act as arbitrator in case of differences between the parties, wrote "approved" at the end of the paper, and signed it. The appellants' agent sent back the paper to the agent of the respondents, who put it in his desk, and nothing further was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper; coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the respondents, there were explanations and excuses given to the appellants, and the "contract" was mentioned in the correspondence, and matters went as before; until, finally, difficulties having arisen, the appellants declined to continue the supply of coals. In an action for damages for breach of the contract, the House of Lords held, affirming the judgment of the Common Pleas and the Court of Appeal, that there was a contract for the coals, acted on by both parties, which was binding, even though they might have intended to have executed a more formal agreement.

[1] The question as to the admissibility of parol evidence to connect papers has often arisen in connection with testamentary instruments, where the question has been whether the reference has been such as to admit of the paper referred to being received for probate as a part of the will. See In the Goods of Sunderland, L. R. 1 Pr. & Div. 199. In this case the principle was acted on that was thus laid down by the Judicial Committee of the Privy Council in Allen *v.* Maddock, 11 Moo. P. C. at p. 454: "A reference to a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular, but the authorities seem clearly to establish that where there is a reference to any written document described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it." The opinion of Lord Eldon, in Smart *v.* Prujean, 6 Ves. 565, is to the same effect, namely, that a testamentary paper duly executed, in another, must refer to it as a written document then existing, in such terms that it may be ascertained. The holding of Sir C. Cresswell, in Von Straubenzee *v.* Mark, 3 Sw. & Tr. 6, 12, is to the same effect. And see Sandford *v.* Vaughan, 1 Phillim. 39, 128; Harvey *v.* Bagshaw, 2 Phillim. 48; Masterman *v.* Maberly, 2 Hagg. 235; Smith *v.* Attersoll, 1 Russ. 266; Milledge *v.* Laman, 4 Desaus. (S. C.) 623.

In a case where it was claimed that memoranda of instructions given by a testator to a clerk, who wrote them down, and which were referred to by the testator in his will, should be received as part of the will, Sir J. P. Wilde refused to grant probate of the notes of instructions, on the ground that before the court can make

Suit was brought by the plaintiffs to recover the price of 300 bales of brown, and 100 cases of blue drills which they had previously sold to the defendant. The contract for the purchase was made with the plaintiff's agents, M. & S., in Boston, on September 19. The following memorandum was made out, and signed by M. and by the defendant: "Sept. 19, W. W. Goddard, 12 mos. 300 bales S. F. drills, 7¼; 100 cases blue do., 8¾. Credit to commence when ship sails — not after Dec. 1; delivered free of charge for truckage. The blues, if color satisfactory to purchasers. R. M. Mason, W. W. Goddard." A bill of parcels was made out under date of September 30, stating the purchase of the goods by the defendant, carrying out prices and footing up the amount at $18,565.03, also the terms of payment, — note at twelve months, payable to the treasurer of the plaintiffs. This was forwarded to the defendant on October 11, and, after its receipt, in pursuance of an order from him, the 300 bales were sent from their establishment at Salmon Falls, by the railroad, and arrived at the depot in Boston on October 30, of which notice was given to the defendant on the same day, and a delivery tendered. He requested that the goods should not be sent to his warehouse, or place of delivery, for the reason, as it subsequently appeared, that he had no room for storage. The agents of the plaintiffs the next day renewed the tender of delivery, by letter, adding that the goods remained at the depot at the defendant's risk and subject to storage; to which no answer was returned. On the night of November 4, the railway depot was consumed, and, with it, the 300 bales of goods. The defendant having refused to give the twelve months' note, suit was brought. The Supreme Court of the United States held,[1] Catron and Curtis, JJ., dissenting, and Daniel, J., as to the Statute of Frauds, assenting, that the plaintiffs were entitled to recover. The court held that

a grant of probate it must be satisfied that at the time the testator signed the will he intended to refer distinctly to some document in existence of which he had cognizance, and that he gave it a definition by which the court is able to identify it. In the Goods of Pascall, L. R. 1 Pr. & Div. 606. Where in a will there was a reference by the testator to a paper "left by me and affixed to this my will," and there was, in fact, no paper affixed to the will, but a paper was produced for probate which had been attached by the testator to a previous will, Lord Penzance refused probate of the paper, on the ground that it was not within the description, as it was not affixed to the will, and, therefore, was not identified. In the Goods of Gill, L. R. 2 Pr. & Div. 6. See In the Goods of Duff, 4 N. of Cas. 474; In the Goods of Stewart, 3 Sw. & Tr. 192.

But in the case of In the Goods of Mercer, L. R. 2 Pr. & Div. 91, where the testator had executed a will in India, which he had left there, deposited in a bank, and then in England executed a codicil to his will, confirming it in all particulars except as altered by the codicil, and subsequently handed a copy of the will to one of his executors, identified by a memorandum at its foot, signed by the testator, as the copy referred to in the codicil, Lord Penzance held that the copy of the will was sufficiently referred to in the codicil to identify it with certainty, and probate of it was granted.

[1] Salmon Falls Manuf. Co. v. Goddard, 14 How. 446.

parol evidence was admissible to show that M. signed the memorandum as agent for the plaintiffs, as well as to show the meaning of "12 mos.," and of "$7\frac{1}{4}$ and $8\frac{3}{4}$;" and, that, although, there might be some obscurity in the terms of the memorandum, and intrinsic difficulty in a proper understanding of them, it was competent, under the circumstances of the case, to refer to the bill of parcels delivered, for the purpose of explanation, — the bill of parcels having been made out by the seller, containing his understanding of the terms and meaning of the contract, and having been received and acquiesced in by the buyer. We see no ground for questioning the correctness of this decision, nor of any of the reasoning which it contains; notwithstanding some question has been raised as to the latter, by a learned American jurist. We think, that, on both of the main grounds on which the contract was sustained, other well-decided cases, both in the United States and England, establish the same principles as those which were acted upon in this case.

The case of Peirce *v.* Corf[1] was an action against an auctioneer for negligence. The facts were that the plaintiff sent his horse to the defendant for sale at auction. In a catalogue for the sale prepared and circulated by the defendant, the plaintiff's horse was described, and was numbered "Lot 49." The conditions of the sale were printed on the catalogue; the catalogue and the conditions forming one document. In the defendant's sales ledger, the plaintiff's horse was also entered with a description, and as "Lot 49;" but neither the catalogue nor the conditions of sale were annexed or affixed to the sales ledger, nor were referred to therein, but the defendant during the sale held in his hand a catalogue with the conditions of sale. The horse was knocked down to one M., for thirty-three guineas, and the price and the purchaser's name were set down by the auctioneer's clerk, in the sales ledger. M., having taken the horse for a test, declined to keep it, and returned it with the following note, signed by him: "I return the grey mare, lot 49, bought at your sale this day, as not being steady in harness as warranted." M. refusing to take delivery and pay for the mare, on a resale by the plaintiff, after notice, for a less sum, the plaintiff sued M. for damages, and was nonsuited. The plaintiff then brought this action in the County Court, and the judge being of opinion that there was no proof of a sufficient connection, by reference or otherwise, between the conditions of sale and the entries in the sales ledger, gave judgment for the plaintiff. On appeal to the Court of Queen's Bench, the judgment was affirmed, the court holding that, although M.'s letter might be

[1] L. R. 9 Q. B. 210.

connected with the catalogue and the conditions, but not with the sales ledger, as neither of these showed the price, and the conditions could not be connected with the sales ledger, within the limits of the principle laid down by Lord Denman, C. J., in Dobell *v.* Hutchinson,[1] or within that of Bird *v.* Boulter;[2] the facts in Peirce *v.* Corf[3] not showing any authority in M. to the auctioneer's clerk to make the entry on behalf of the highest bidder.

In Stanley *v.* Dowdeswell,[4] where there was an offer in a letter, by the plaintiff's agent to the defendant (a memorandum of the particulars being enclosed), of the sale of leasehold premises, and a letter by the defendant, in reply, which letters, it was held, were sufficiently connected, and were sufficient to show the terms of the offer, yet, as the defendant, in his letter, referred to matters to be arranged with his agent, it was held that, following Morris *v.* Wilson,[5] and Shortrede *v.* Cheek,[6] though there was a sufficient reference in the defendant's letter to the memorandum inclosed to him in the plaintiff's letter, to let in oral evidence to show what that memorandum was, and so to connect the two letters, still, by a fair interpretation of the defendant's letter, it was plain that his mind was never at one with the mind of the plaintiff, and that there was no sufficient acceptance of the offer to bind him; the whole matter remaining *in fieri*.

But in Leather Cloth Co. *v.* Hieronimus,[7] where the plaintiffs had orally sold goods to the defendant, but, in consequence of circumstances having changed, shipped them by a different route from that originally contemplated and agreed upon between the parties, where subsequent letters between them were so connected as to show the original contract they had made, it was held that this was sufficient evidence of the contract to satisfy the statute; written evidence of the defendant's acquiescence in the mode of performing the contract not being necessary.[8]

Much difference of opinion existed in the decision of the important case of Rossiter *v.* Miller.[9] There, several persons interested in a particular piece of land authorized, by agreement among themselves, one of their number, W., to dispose of it. The land was divided into lots and a plan of the lots made, and certain conditions, on which the land might be let or sold, were printed on the plan. M., an intending purchaser, made inquiries of W. as to

[1] 3 A. & E. at p. 371.
[2] 4 B. & Ad. 443.
[3] L. R. 9 Q. B. 210. See *supra*, p. 625, *et seq.*, where these cases are examined.
[4] L. R. 10 C. P. 102.
[5] 5 Jur. N. S. 168.
[6] 1 A. & E. 57.
[7] L. R. 10 Q. B. 140.
[8] See *ante*, p. 594, *et seq.*, where this latter subject is fully considered.
[9] 5 Ch. Div. 648; 3 App. Cas. 1124.

the sale of certain lots. W. expressly informed him that he must purchase subject to the conditions stated on the plan. One of these conditions required that a purchaser should execute a contract embodying the conditions. M. offered to purchase these lots at a price which he named. W. offered to lay his offer before "the proprietors" (without naming or describing them), and very shortly afterwards wrote to M. that he had done so, and (stating the conditions) that the proprietors had accepted his offer, adding, that in reducing the price they had taken into consideration his intention of soon building on the land, an intention which of course they wished to encourage. W. added that he had instructed the solicitors to forward to M. the agreement for purchase. There was, in fact, nothing in the conditions which bound a purchaser to build, though there were provisions which assumed that he might do so, and which, in such a case, regulated the mode of proceeding. M. wrote back, in answer, that he could not be bound to build at any given time, or at all, — that the subject had better be reconsidered, unless W. was prepared to leave him to do as he might think best. W. replied that the acceptance of the offer was without condition, and that M. was free to do what he might think best. The formal contract was prepared and sent to M., but he refused to sign it, or to complete the purchase. In a suit for specific performance before Sir George Jessel, M. R., the question whether the letters were such as to constitute a concluded contract was scarcely adverted to; the question chiefly argued being whether the word "proprietors" was a sufficient description within the Statute of Frauds.[1] The Master of the Rolls held that the description was sufficient, and decreed specific performance. On appeal to the Court of Appeal,[2] it was held, that although the word "proprietors" was a sufficient description, specific performance could not be decreed, for that on the true construction of the documents the signing of a formal contract was a condition precedent to the parties being bound. On appeal to the House of Lords[3] the decision of the Court of Appeal was reversed, and the order of the Master of the Rolls was restored, the House of Lords holding, both with the Master of the Rolls and the Court of Appeal, that the description of "the proprietors" was sufficient, and that what had taken place by the correspondence constituted a complete contract between the parties; that under such circumstances the execution of a formal deed was not necessary; that

[1] See Potter *v.* Duffield, L. R. 18 Eq. 4; Catling *v.* King, 5 Ch. Div. 660; Hood *v.* Lord Barrington, L. R. 6 Eq. 218; Sale *v.* Lambert, L. R. 18 Eq. 1; Thomas *v.* Brown, 1 Q. B. Div. 714; Beer *v.* London & Paris Hotel Co., L. R. 20 Eq. 412; Morris *v.* Wilson, 5 Jur. N. S. 168; Skelton *v.* Cole, 1 De G. & J. 587.

[2] Rossiter *v.* Miller, 5 Ch. Div. 648.

[3] Rossiter *v.* Miller, 3 App. Cas. 1124.

the reference to it in W.'s letter did not suspend or in any way affect the contract, and that M. was bound specifically to perform his contract of purchase.[1]

[1] In the ultimate decision of the case, the principle laid down by Lord Westbury in Chinnock *v.* The Marchioness of Ely, 4 De G. J. & S. 638, 645, was acted on, where he says: "I entirely accept the doctrine contended for by the plaintiff's counsel, and for which they cited the case of Fowle *v.* Freeman, 9 Ves. 351; Kennedy *v.* Lee, 3 Mer. 141, and Thomas *v.* Dering, 1 Keen, 729, which establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the statute of frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or *although it may be an express term that a formal agreement shall be prepared and signed by the parties.* As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, *there exist all the materials which this court requires to make a legally binding contract.*" The judges of the Court of Appeal considered that the facts in Rossiter *v.* Miller, 5 Ch. Div. 648, 3 App. Cas. 1124, came within the language of Lord Westbury, succeeding the above, as follows: "But, if to a proposal or offer, an assent be given to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation. And this appears to me to be the real state of the case before me; for I am clearly of opinion that the true and fair meaning and legal effect of the letter of the 19th of November may be expressed in these words: 'I will go on with the treaty for the sale to you of my house, and for that purpose will send you the form of the contract which I am willing to enter into.' I take, therefore, the letter of the 19th of November either as a conditional acceptance of the plaintiff's terms, subject to the draft contract being agreed to, or as an expression of willingness to continue the negotiation, and for that purpose to propose a form of agreement." Dealing with these two entirely consistent propositions, Lord Cairns, L. C., in Rossiter *v.* Miller, 8 App. Cas. at p. 1139, said, referring more particularly to the latter of the above two propositions: "I can only say that I am willing to accept every word of Lord Westbury as there given. I assume that the construction put by him upon the letter I have quoted was a proper construction, and I entirely acquiesce in what he says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind. There is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind is to be made."

This, we think, is a simple, clear, and conclusive statement of the law applicable to this class of cases; as is also the following from Lord Hatherley: "If you can find the true and important ingredients of an agreement in that which has taken place between the parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all these matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, We will have this agreement put into due form by a solicitor. If it is stated in so many plain and express terms (and in Chinnock *v.* The Marchioness of Ely, 4 De G. J. & S. 638, that was the ground on which that case proceeded) that one of the very terms of the agreement itself was that it should not be concluded by the agent employed in the first place to enter into the negotiation, and that it should not be a concluded agreement until a solicitor intervened and drew a formal agreement; if you find that to be a term of the agreement itself, well and good; if not, the agreement stands. Both parties may desire that it shall be put into a formal shape by a solicitor, who, in that case, will not be able to vary the agreement either on one side or the other, but only to put into a more formal and professional shape the agreement which had been completely formed with unity of purpose with reference to the sale and purchase by the

The clauses in the conditions on which the difficulty in the main question in Rossiter *v.* Miller[1] arose, are in the eighth condition, and are as follows: "*Each purchaser, on completing his purchase*, to execute a deed of covenant embodying the above rules and stipulations, and providing for their due performance mutually by such purchaser and the vendors. . . . Each purchaser will be required to sign a contract embodying the foregoing conditions, and providing for the payment of a deposit at the rate of £10 per cent. on the amount of the purchase-money, and for the completion of the purchase at the expiration of not exceeding two months from the date of the contract. The cost of such contract will be included in the fixed charge for the conveyance provided for by the first stipulation." The first clause referred to provided that, "The proprietors will furnish a conveyance exclusive of stamp duties, with a title commencing from Oct. 30, 1797, for the sum of £2 2*s.* for each plot. This to include the lithographed abstract, the deed of covenant embodied in the conveyance, and the contract hereinafter mentioned. Should any purchaser prefer employing his own solicitor he can do so at his own expense, paying the vendor's solicitor the sum of £2 2*s.* for the abstract of title." The correspondence clearly showing an agreement for the purchase of the specified lots, according to the conditions, and satisfying the Statute of Frauds, the error of the Court of Appeal

two parties to the contract." *Ibid.* at p. 1143.

The following from the opinions of Lord Blackburn and Lord Gordon (at pp. 1151, 1154), is equally valuable and conclusive. Said the former: "I quite agree with the Lords Justices that (wholly independent of the statute of frauds) it is a necessary part of the plaintiff's case to show that the two parties had come to a final and complete agreement; for if not, there was no contract. So long as they are only in negotiation, either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties in such a case are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties, does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties, so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is complete." And Lord Gordon: "I concur in thinking that the judgment come to by the Lords Justices of Appeal is erroneous. I think the correspondence founded on, constituted a completed contract for the purchase and sale of the lots in question, at the price stipulated, and on the conditions specified in the conditions and stipulations printed on the plan. No doubt those conditions provided for a subsequent and formal deed being executed by the parties; but that deed was only for the purpose of more formally setting forth the conditions upon which the parties had agreed. If there was anything introduced into the proposed deed which the purchaser considered beyond the terms and conditions on which he purchased the property, he would have been entitled to object; and, if necessary, the proper terms of the deed could have been adjusted at the sight of a court of law. But in my view *the contract* between the parties was concluded by the correspondence and the conditions which were referred to and embodied in it."

[1] 5 Ch. Div. 648; 3 App. Cas. 1124.

arose from treating the eighth condition as preventing that which, clearly, otherwise was an agreement in writing to "a set of terms," and constituting a contract, from constituting a contract, because of the existence of such eighth condition. Whereas, in fact, the correspondence evidenced the purchase by the defendant of the specified lots, on the whole of the conditions, and showed a final agreement for such purchase on the whole of such terms, including the first and eighth, as well as the other conditions. The contrary entirely untenable assumption was at the base of the error of the judges of the Court of Appeal, as is well shown by the conclusion of the decision of Lord Coleridge, C. J., where he says: "If a set of terms are agreed upon in writing, they constitute a contract, although it may be the intention of the parties that they should be put into a more formal shape; but here a set of terms never was finally agreed to, and the defendant cannot be held to be bound."[1] On the contrary, the House of Lords held, and the correspondence shows, too clearly, we think, for doubt or question, that a set of terms was agreed to, which did constitute a contract, and, therefore, the plaintiffs had a right to a decree for a specific performance of the whole contract, *including the first and eighth* as well as the other conditions.[2]

Winn *v.* Bull[3] still further exemplifies the principle, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. But when it is not expressly stated to be subject to a formal contract, it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.[4] In this case, under an agreement in writing to let and take a lease of premises specifically named; the premises, the parties, the commencement and end of the term, the rental, and other terms,

[1] 5 Ch. Div. at p. 658.

[2] See further, Peek *v.* The North Staffordshire Ry. Co., 10 H. L. Cas. 473; Smith *v.* Webster, 3 Ch. Div. 49; Honyman *v.* Marryatt, 6 H. L. Cas. 112; Fowle *v.* Freeman, 9 Ves. 351; Kennedy *v.* Lee, 3 Mer. 441; Thomas *v.* Dering, 1 Keen, 729; Glengall *v.* Barnard, 1 Keen, 796; *nom.* Glengall *v.* Thynne, 2 H. L. Cas. 131; Skinner *v.* McDonall, 2 De G. & Sm. 265; Crossley *v.* Maycock, L. R. 18 Eq. 180; Ridgway *v.* Wharton, 6 H. L. Cas. 238; Bonnewell *v.* Jenkins, 8 Ch. Div. 70; Hood *v.* Barrington, L. R. 6 Eq. 218; Sale *v.* Lambert, L. R. 18 Eq. 1; Potter *v.* Duffield, L. R. 18 Eq. 4; Commins *v.* Scott, L. R. 20 Eq. 11; Beer *v.* London & Paris Hotel Co., L. R. 20 Eq. 412; Catling *v.* King, 5 Ch. Div. 660; Brogden *v.* The Metropolitan Ry. Co., 2 App. Cas. 666; Meynell *v.* Surtees, 3 Sm. & Giff. 101; Marvin *v.* Wallis, 6 E. & B. 726; Chinnock *v.* The Marchioness of Ely, 4 De G. J. & S. 638; Winn *v.* Bull, 7 Ch. Div. 29; Skelton *v.* Cole, 1 De G. & J. 287; Thomas *v.* Brown, 1 Q. B. Div. 714.

[3] 7 Ch. Div. 20.

[4] *Per* Jessel, M. R., *Ib.* at p. 32.

were sufficiently named, so as to have constituted the writing a completed lease, but for the clause with which the writing concluded: "This agreement is made subject to the preparation and approval of a formal contract." Subsequently, disputes arose between the parties, in the preparation of the formal contract, as to the insertion of terms not provided for in the original writing, which resulted in the defendant's refusing to accept a lease at all. In an action for specific performance of the agreement, Jessel, M. R., held that the Statute of Frauds was not satisfied. The distinctive principles were held to be, (1) if in the case of a proposed sale or lease of an estate two persons agree to all the terms and say "We will have the terms put into form," then, all the terms being put into writing and agreed to, there is a contract. But, (2) if two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled. This latter position is extra-judicial, and is open to question.

In Winn *v.* Bull[1] the agreement was made "subject to the preparation and approval of a formal contract." And, clearly, until such formal contract had been prepared and approved, there was no approved formal contract. But this, obviously, is quite different from what it would have been, if, after having agreed in writing to the main terms of the contract, the writing had provided, as suggested by Jessel, M. R., in his second position as above, that the minor terms should be submitted to a solicitor, and *should be such as were approved of by him.* In this case, as in the previous case put by Jessel, M. R., we think it is clear that here too "there is a contract." Certainly, Winn *v.* Bull[2] is very far from being an authority to the contrary.

The doubt which we have raised above as to the exact critical correctness of the latter of the two views expressed by Jessel, M. R., in Winn *v.* Bull, as quoted above, is fully sustained by the decision of the Court of Appeal, affirming the judgment of Fry, J., in Bonnewell *v.* Jenkins.[3] There the plaintiff made an offer in writing for the purchase of specified leasehold premises, the writing containing the following clause: "This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction, which I am informed can be done." This offer was accepted in writing by the defendant's agent. No further contract was signed. The defendant procured the alteration in the lease

[1] 7 Ch. Div. 29.
[2] *Ibid.*
[3] 8 Ch. Div. 70.

to the satisfaction of the plaintiff's solicitor. Disputes having arisen, the vendor ultimately refused to complete. In an action by the purchaser for specific performance, Fry, J., held, that the letters made a binding contract, and his decision was affirmed by the Court of Appeal. The point made by Jessel, M. R., in Winn *v.* Bull,[1] that because it was expressed that certain conditions had to be modified to the satisfaction of the purchaser's solicitor, that, upon this being done, the writings still showed no contract, was not even contended for in Bonnewell *v.* Jenkins,[2] and, as we have intimated above, is, we think a clearly unsound *obiter dictum*, and is directly repudiated by the holding in this latter case. The point made in this case was that as the defendant's agent, in his acceptance of the plaintiff's offer, had added, "We have asked Mr. J.'s solicitor to prepare contract," that therefore the writings themselves did not show a contract. But, on this point, the affirmed decision of Fry, J., was otherwise; James, L. J., well saying: "Whether there is a binding contract or not depends on the construction of two letters. It is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain. There are indeed cases, such as Rossiter *v.* Miller,[3] where the court may hold that the reference to the future contract is such as to show that the parties did not intend to be bound until it was signed, but such cases depend on their own special circumstances. Here there is an unconditional acceptance by the defendant of the plaintiff's offer, and the reference to the preparation of a formal contract appears to me to be immaterial."

In Huelson *v.* Buck,[4] where, in a contract for the purchase of a lease, it was stated that it was "made subject to the approval of the purchaser's solicitor," it was held that this was an essential term in the contract, and that there would not be a decree for specific performance, unless such approval was unreasonably refused.[5]

And in Hussey *v.* Horne-Payne,[6] where the plaintiff's agent, after having written an acceptance of the defendant's offer to sell an estate, added, "Subject to the title being approved by our solicitors," the Court of Appeal held that this imported a new term into the contract; that, therefore, the defendant's offer had not been accepted, and that specific performance of the contract could not be enforced. On appeal to the House of Lords,[7] the case went off on another ground, but Earl Cairns, L. C., expressed a doubt, if it

[1] 7 Ch. Div. 29.
[2] 8 Ch. Div. 70.
[3] 5 Ch. Div. 648.
[4] 7 Ch. Div. 683.
[5] And see Williams *v.* Edwards, 2 Sim. 78.
[6] 8 Ch. Div. 670.
[7] Hussey *v.* Horne-Payne, 4 App. Cas. 311.

had been necessary to decide that question, whether that term meant anything more — subject to any objection which the solicitor made being submitted to decision by a proper court, if the objection was not agreed to — than a guard against its being supposed that the title was to be accepted without investigation; as meaning in fact that the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser.

In Hussey *v.* Horne-Payne,[1] the question really involved was as to whether in a series of letters there was a sufficient note or memorandum of the contract to satisfy the Statute of Frauds. Malins, V. C., held that a complete contract was shown by two letters between the parties, and that the after correspondence between the parties showed an attempt to abandon it on the one part, and a refusal to do so on the other; not amounting to a rescission of the contract. This decision was reversed by the Court of Appeal, the Lord Justices being of the opinion that the second letter introduced a new term which required acceptance, and that there was, therefore, no note or memorandum of a complete contract shown. On appeal to the House of Lords,[2] less stress was placed on the language relied on in the Court of Appeal, as "a new term," but the House of Lords held, that, where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration; and applying that rule to this case, though the first two letters of the correspondence seemed to constitute a complete contract, the House of Lords, upon the whole of what had passed in letters and conversation, came to the conclusion that no concluded and complete contract had been established.[3]

Where, in the written acceptance of a tender, there is an intima-

[1] 8 Ch. Div. 670.

[2] 4 App. Cas. 311.

[3] Lord Selborne's observations on this point are deserving of quotation, as follows: "I cannot agree with what appeared to be suggested by part of the appellant's argument that, because two letters were written, by which the conditions required by the statute of frauds would have been satisfied if there were nothing outside those letters to the contrary, therefore there is here such a concluded agreement as a court of equity ought specifically to perform without regard to what preceded or what followed. The observation has often been made that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally setting the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement. I adhere to what I said when sitting in the Court of Chancery, in the case of Jervis *v.* Berridge (8 Ch. Ap. at p. 360), that the statute of frauds 'is a weapon of defence, not offence,' and 'does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and

tion that a contract will be afterwards prepared, that does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties by the tender and acceptance was thereby to enter into an agreement, and if the reference to the preparation of the contract was made merely for the purpose of expressing that the agreement already arrived at would be put in more formal language. The question is the same as has come up so frequently in connection with that as to whether an agreement for a lease may not be treated as a lease where the agreement contains all the terms necessary to constitute it a lease. It is simply a question of the intention of the parties, and where the offer and acceptance are in writing, it is a question for the court, in construing the documents, to decide whether in point of law there is enough in them to constitute a contract, and, if so, the rule of construction is that on the acceptance of an offer, without introducing new terms, the expression of a wish for a more formal instrument is not sufficient to enable a court of justice to hold that a final agreement has not been arrived at.[1]

The defendant, in Long *v.* Millar,[2] was an estate agent, and was employed by one G. to sell three plots of land for £310. The plaintiff agreed with the defendant to buy the property for £310, and paid a deposit of £31 in respect of the purchase. The plaintiff signed the following document: "I hereby agree to purchase the three plots (forty feet frontage) of freehold land in R. Street, Hammersmith, for £310, and I agree to pay as a deposit and in part payment of the aforesaid purchase-money the sum of £31, and to complete the purchase and pay the balance of the purchase-money on or before October 5, next." The defendant signed a receipt for the £31, "as a deposit on the purchase of three plots of land at Hammersmith." G., however, in the mean time, having made an expenditure on the property, refused to complete the purchase for £310, and required £450 for it. The defendant offered to return the deposit, but the plaintiff insisted upon having the plots of land for £310. In an action for damages for breach of contract, the jury found *inter alia* that the defendant sold as principal, and there was judgment for the plaintiff. The Common

real intention of the parties;' and I think it especially important to keep that principle in view when, as in the present case, it is attempted to draw a line at one point of a negotiation conducted partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations, which to my mind plainly shows that terms of the intended agreement which were of great practical importance, and were so regarded on both sides, then remained unsettled, and were still the subject of negotiation between them." Hussey *v.* Horne-Payne, 4 App. Cas. at p. 322.

[1] Lewis *v.* Brass, 3 Q. B. Div. 667.

[2] 4 C. P. Div. 450.

Pleas Division on appeal ordered a new trial, on the ground that the finding was against the weight of evidence. Their decision was sustained by the Court of Appeal, on that ground; but it was held, by the Court of Appeal, that the two documents taken together satisfied the statute. Baggallay, L. J., said: "The true principle is that there must be a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence. I think that in the present case, by the words 'purchase of three plots of land' the receipt sufficiently refers to the document signed by the plaintiff. Therefore the contract seems to me to be complete." And Bramwell, L. J., holding the same view, gave the following illustration: "Suppose that A. writes to B., saying that he will give £1000 for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return, 'I accept your offer.' In that case there may be an identification of the documents by parol evidence, and it may be shown that the offer alluded to by B. is that made by A., without infringing the Statute of Frauds, which requires a note or memorandum in writing."

The plaintiff had signed a memorandum setting forth the terms of a contract by which the plaintiff agreed to let a carriage to the defendant for the period of a year. The defendant, in a subsequent letter to the plaintiff, signed by the defendant, referred to "our arrangement for the hire of your carriage." There was no other arrangement for the hire of a carriage than that the terms of which were contained in the memorandum signed by the plaintiff. It was held, that the defendant's letter sufficiently referred to the document containing the terms of the contract, to constitute a good memorandum within the fourth section of the Statute of Frauds.[1]

In Shardlow *v.* Cotterell[2] the plaintiff claimed specific performance of a contract to purchase a house and premises sold by auction. After the sale, the auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to A. Shardlow, butcher, Pinxton, and deposit paid at close of sale." And he also signed this receipt: "Pinxton, March 29, 1880. Received of A. Shardlow, the sum of £21 as deposit on property purchased at £420 at Sun Inn, Pinxton, on the above date, Mr. G. Cotterell, owner." The Statute of Frauds was set up in defence. The conditions contained no description of the property sold, but posters had been put up describing the property to be sold on March 29, at the Sun Inn. Held, that the receipt, but not the poster, might be read with the memorandum, but, that, without the

[1] Cave *v.* Hastings, 7 Q. B. Div. 125. [2] 18 Ch. Div. 280.

poster, there was not a sufficiently definite description of the property sold and purchased to enable the court to receive parol evidence of what the property consisted, and that, consequently, the Statute of Frauds was a good defence to the action.[1]

Two or more documents which do not refer to each other, but do refer to the same parol contract, and which, when taken together, contain all the terms of the parol contract, may together constitute a sufficient memorandum within the Statute of Frauds. On Sept. 22, 1882, the defendant verbally agreed with the plaintiff to sell him her share in certain property for £200, and signed and gave to him the following receipt, — "Sept. 22, 1882. Received of J. Studds *one pound* [*on account* was probably meant] of my share in the Barrett's Grove property the sum of two hundred pounds." No time was fixed for completion, and no abstract was delivered, and, on March 19, 1883, the defendant wrote to plaintiff: "Mr. Studds: Sir, — If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22d instant, I shall consider the agreement (made Sept. 22, 1882) not any longer binding." It was held, that the word "balance" in the letter sufficiently referred to the receipt to enable the two documents to be read together, and that they constituted a sufficient memorandum within the Statute of Frauds; and, also, that even if the word "balance" was not sufficient to connect the two documents, yet that, as they both referred to the same parol contract, all of which was contained in one or other of them,

[1] In this case, Kay, J., made an elaborate examination of the authorities, his criticism of which shows his well-founded dissatisfaction with many of them, and concludes thus: "I am not disposed to carry the law on this subject one hair's breadth beyond the decided cases, and I think I should be doing so if I were to hold that in this contract there is a sufficient description of the property. I hold that the only documents in writing to which I can refer, are the receipt and the conditions and the memorandum signed at the bottom of them, and I hold, upon the authority of Long *v.* Millar, 4 C. P. D. 450, that in those two documents taken together, there is not a sufficient definite description of the property sold and purchased to enable me to receive parol evidence of what the subjects of that sale and purchase were. Having come to that conclusion, I am bound to dismiss this action, which I do."

The following cases, in addition to Long *v.* Millar, 4 C. P. Div. 450, were examined in Shardlow *v.* Cotterell, 18 Ch. Div. 280: Western *v.* Russell, 3 Ves. & B. 187; Ogilvie *v.* Foljambe, 3 Mer. 53; Baumann *v.* James, L. R. 3 Ch. 508; MacDonald *v.* Longbottom, 1 E. & E. 977; Owen *v.* Thomas, 3 My. & K. 353; Rossiter *v.* Miller, 3 App. Cas. 1124; Catling *v.* King, 5 Ch. Div. 660; Horsey *v.* Graham, L. R. 5 C. P. 9; Kennedy *v.* Lee, 3 Mer. 441; Williams *v.* Lake, 3 E. & E. 349; Blagden *v.* Bradbear, 12 Ves. 466; Coles *v.* Trecothick, 9 Ves. 234; Potter *v.* Duffield, L. R. 18 Eq. 4; Commins *v.* Scott, L. R. 20 Eq. 11; Morris *v.* Wilson, 5 Jur. N. S. 168; Wood *v.* Scarth, 2 K. & J. 33; Sale *v.* Lambert, L. R. 18 Eq. 1. And see Boydell *v.* Drummond, 11 East, 142; Ridgway *v.* Wharton, 6 H. L. Cas. 238; Smith *v.* Webster, 3 Ch. Div. 49; Rishton *v.* Whatmore, 8 Ch. Div. 467; Williams *v.* Jordan, 6 Ch. Div. 517; Caton *v.* Caton, L. R. 2 H. L. 127; Vandenburgh *v.* Spooner, L. R. 1 Ex. 316; Allen *v.* Bennet, 3 Taunt. 167; Buxton *v.* Rust, L. R. 7 Ex. 1, 279; Sykes *v.* Dixon, 9 A. & E. 693; Dobell *v.* Hutchinson, 3 A. & E. 355; and the other cases cited in this Part.

they could be read together, and together they constituted a good memorandum within the statute.[1]

A number of propositions relating to the Statute of Frauds were established by Kekewich, J., in the late case of Wylson *v.* Dunn.[2] A proposal had been made that the two plaintiffs should buy a triangular field of about three acres, and that the defendant should buy half an acre of it from them. One of the plaintiffs and the defendant met on the field. The defendant wished to have a piece in one of the angles, and the plaintiff stepped so as to mark out where a base line would cut off half an acre. Some days afterwards the same plaintiff wrote to the defendant asking her to let them have a letter agreeing to purchase the half acre she had selected, for £350. She wrote back, not expressly referring to the other letter, that she was willing to take half an acre as agreed upon for £350. The plaintiffs did not obtain a contract with the owner of the land for the purchase until November 4, which was three months afterwards. On November 13, the defendant threatened to withdraw, and on November 20, her solicitors wrote that she did withdraw from the contract. Kekewich, J., held as follows: 1. That the small element of uncertainty in the measurement of the land might be disregarded, and that the parties must be considered as having determined the exact piece of land to be taken. 2. That the second letter contained a sufficient reference to the first; and that the two letters formed a valid contract within the Statute of Frauds. 3. That though the two plaintiffs were the purchasers of the land, and the letters forming the contract passed between the defendant and one only of the plaintiffs, he must under the circumstances be considered as agent for the other as well. 4. That the doctrine of non-mutuality being a bar to specific performance, does not apply to a contract which to the knowledge of both parties cannot be enforced by either until the occurrence of a particular event; and, therefore, 5. That though the defendant might have withdrawn at any time before November 4, when the plaintiffs first became able to perform their part, she could not withdraw afterwards.

In an Irish case[3] the defendant purchased at an auction certain lots of maize, the property of the plaintiff, the bulk of which was in store. In an action for not removing the maize within the time mentioned in the conditions of sale, and to recover the loss upon a resale, the plaintiff and the auctioneer deposed that the sale was by sample, and it appeared that samples had been exhibited at the auction, but the entry in the auctioneer's book of the

[1] Studds *v.* Watson, 28 Ch. Div. 305.
[2] 34 Ch. Div. 569.
[3] McMullen *v.* Helberg, 4 L. R. Ir. 94.

sales to the defendant omitted to state that the sale was by sample. It was held by a majority of the court, that there being uncontradicted evidence of the sale having been a sale by sample, importing in the ordinary signification of the words an agreement that if the bulk did not correspond with the sample, the purchaser should not be bound, the entry in the auctioneer's book omitted a material term of the contract in not stating that the sale was by sample, and, therefore, it was not a sufficient memorandum of the contract under the Statute of Frauds.

The plaintiffs having subsequently to the auction furnished the defendant with an invoice of the lots sold, stating the quantities, prices, and places where stored, accompanied by a letter referring to such invoice, and requesting payment, the defendant replied by a letter signed by him, in which he acknowledged the receipt of the invoice, and offered to accept the plaintiffs' draft at three months for the amount, and to give them a lien on the goods in the mean time. It was held, by a majority of the court, that the letters, coupled with the invoice to which they referred, constituted evidence in writing of a contract for the purchase of the goods, which satisfied the statute. O'Brien, J., dissented from the holding of the majority on this latter point, on the ground that the majority sustained the first point, viz., that, as the invoice and the correspondence did not show that the sale was by sample, the writings failed to supply a note or memorandum of the whole contract. We think his view on this point was entirely sound.[1]

[1] Where the party whom it is sought to charge has signed a writing containing all the essential terms of a contract of sale, even though it be the intention of the parties to prepare and execute a more formal contract, which is not done, but the parties act on the terms of the informal contract, this sufficiently shows the *consensus* of the parties to such a contract, which can be enforced against the party who has signed the writing; the mutuality appearing by the parties acting under the terms of the writing. Thus in Brogden *v.* Metropolitan Ry. Co., 2 App. Cas. 666, it was held that circumstances in the conduct of two parties may establish a binding contract between them, although the agreement reduced into writing as a draft has not been formally executed by either. In such a case, the word "approved," written by one of the parties at the end of the draft agreement, and signed by him, must be taken as an approval by him of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form.

In this case, the appellants, B. & Co., had for some years supplied the respondents, the M. Company, with coal. At last it was suggested by B. that a contract should be entered into between them. After their agents had met together, the terms of agreement were drawn up by the agent of the M. Company, and sent to B. B. filled up certain parts of it which had been left in blank, and introduced the name of the gentleman who was to act as arbitrator in case of difference between the parties, wrote "approved" at the end of the paper, and signed his own name. B.'s agent sent back the paper to the agent of the M. Company, who put it in his desk, and nothing further was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper: coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the M. company, there were explanations and excuses given by B., and the "contract" was mentioned in the correspondence, and matters went on as be-

fore. Finally, B. & Co. declined to continue the supply of coals. On an action for damages for breach of contract having been brought by the respondents, the defendants (the appellants) denied the existence of any contract for the supply of the coal. On a special case before the Common Pleas, judgment was entered for the plaintiffs. The case was carried to the Court of Appeal, when the judgment was affirmed by Bramwell and Amphlett, BB. ; Cockburn, C. J., dissenting. The case was then appealed to the House of Lords, where, circumstances having rendered a second argument necessary, the case was considered to be so plainly and clearly against the appellants, that the respondents' counsel were not called upon. The House of Lords held, in affirming the judgment of the courts below, that the facts and the actual conduct of the parties established the existence of such a contract, and there having been a clear breach of it, B. & Co. must be held liable upon it. Among the judges so deciding, were some of the ablest lawyers of England, Lord Cairns, Lord Selborne, and Lord Blackburn.

The case was not reported except on the appeal to the House of Lords, but in the judgment of Lord Blackburn, a reference was made to an incorrect opinion in the case of Mr. Justice Brett, who in the Common Pleas, said, referring to the case of *Ex parte* Harris, *In re* Imperial Land Company of Marseilles, L. R. 7 Ch. 587, and other cases, that he had come "to a strong opinion that the moment one party has made a proposition of terms to another, and it can be shown by sufficient evidence that that other has accepted those terms *in his own mind*, then the contract is made before that acceptance is intimated to the proposer." This is so manifestly opposed to principle and authority that we are not surprised to find Lord Blackburn emphatically expressing his disagrement with so radically unsound a principle, as he did, as follows : "I must say that that is contrary to what my impression is, and that I cannot agree in it. If the law was as intimated by Mr. Justice Brett, there would be nothing to discuss in the present case. But I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request, express or implied, that he must signify his acceptance by doing some particular thing, then as soon as he does that thing he is bound. If a man sent an offer abroad, saying : 'I wish to know whether you will supply me with goods at such and such a price, and if you agree to that, you must ship the first cargo as soon as you get this letter,' there can be no doubt that, as soon as the cargo was shipped, the contract would be complete, and if the cargo went to the bottom of the sea it would go to the bottom of the sea at the risk of the orderer. So again where, as in the case of *Ex parte* Harris, a person writes a letter and says, 'I offer to take an allotment of shares,' and he expressly or impliedly says, 'If you agree with me, send an answer by the post,' there, as soon as he has sent that answer by post, and put it out of his control, and done an extraneous act which clenches the matter and shows beyond all doubt that each side is bound, I agree the contract is perfectly plain and clear. But when you come to the general proposition which Mr. Justice Brett seems to have laid down, that a simple acceptance in your own mind without any intimation to the other party, and expressed by a private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that." 2 App. Cas. at p. 691. With which view we fully concur, and think the matter of importance sufficient to justify the additional quotation of the following from the same learned judge, who continues : "It appears from the year books that as long ago as the time of Edward IV. (17 Edw. IV. T. Pasch case, 2), Chief-Justice Brian decided this very point. The plea of the defendant in that case justified the seizing of some growing crops, because he said the plaintiff had offered him to go and look at them, and if he liked them and would give 2*s.* 6*d.* for them, he might take them ; that was the justification. That case is referred to in a book which I published a good many years ago, Blackburn on Contracts of Sale (p. 190 *et seq.*), and is there translated. Brian gives a very elaborate judgment, explaining the law of the unpaid vendor's lien, as early as that time, exactly as the law now stands, and he consequently says : 'This plea is clearly bad, as you have not shown the payment or the tender of the money ;' but he goes further and says (I am quoting from memory, but I think I am quoting correctly), 'Moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them, you signified it to the plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is ; but I grant you this, that if in his offer to you he had said, go and look at them, and if you are pleased with them, signify it to such and such a man, and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact.' I take it, my lords, that that which was said three hundred years ago and more, is the law to this day, and it is quite what Lord Justice Mellish in *Ex parte* Harris (L. R. 7 Ch. 593) accu-

rately says, that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted. You are bound from the moment you post the letter, not, as it is put here, from the moment you make up your mind on the subject." This fully accords with our own view, as will be seen in a later volume of this work, where we differ with the views of Bramwell, L. J., as expressed by him in The Household Fire Insurance Co. *v.* Grant, 4 Ex. Div. 216, where he discusses the effect of posting letters in the formation of contracts.

A letter signed by the party to be charged, written to his own agent, referring to letters of the agent stating the terms upon which the latter has made a contract on his behalf with the other party for the purchase of goods, is a sufficient note or memorandum of the bargain to satisfy the 17th section of the statute of frauds. Gibson *v.* Holland, L. R. 1 C. P. 1. And see Smith *v.* Watson, Bunb. 55; Clerk *v.* Wright, 1 Atk. 12. But a letter written by the defendant in answer to letters of plaintiff containing the terms of a bargain for the sale of cotton, was held not sufficient to amount to a memorandum within the 17th section of the statute, because it did not amount to an absolute admission of the existence of a contract in the terms alleged by the plaintiff, being equally consistent with the existence of a different contract. Caregan *v.* Richards, 15 L. T. N. S. 252. And the note or memorandum must exist when the action is commenced. Lucas *v.* Dixon, 2 Q. B. Div. 357; and where, in equity, the contract is admitted, the statute must be pleaded. *Ib.* 358.

The plaintiff sent a mare to be sold by auction at the defendant's repository. The defendant advertised the mare for sale by auction on March 28, 1872, and circulated a printed catalogue of the horses to be sold at his sale, with conditions of sale annexed, in which the plaintiff's mare was described as lot 49. The defendant had a sales ledger, which was headed, "Sales by auction, 28 March, 1872," in which the plaintiff's mare was also numbered 49; but neither the catalogue nor the conditions of sale were annexed to the sales ledger, nor were they referred to therein. On March 28, 1872, the lots described in the catalogue were put up by the defendant for sale under the conditions. The plaintiff's mare was put up for sale, and knocked down to M. for £33, and thereupon the defendant's clerk wrote in the columns of the sales ledger, left blank for this purpose, the name of M. as purchaser, and the price. M. afterwards refused to take the mare. In an action brought by the plaintiff for damages sustained through the negligence of the defendant as an auctioneer in not making a binding contract with M., it was held that the catalogue and the conditions of sale were not sufficiently connected with the entries in the sales ledger to make a note or memorandum in writing of a contract by M. to satisfy the statute of frauds; that the entry by the clerk was not by an authorized agent so as to bind the purchaser, and that the plaintiff was entitled to recover his damages against the defendant. Peirce *v.* Corf, L. R. 9 Q. B. 210.

A broker, acting for the plaintiff, made a contract for the sale of goods to the defendant, sending a note to each party, but signing only that which was sent to the seller. He, however, entered the contract in his book, in which he signed both the bought and the sold note. The defendant kept the note which was sent to him without objection until called upon to accept the goods, when he repudiated the contract, assigning for reason that the note sent to him was not signed. The court held that the conduct of the defendant amounted to an admission that the broker had authority to make the contract for him, and, consequently, that the broker's signature to the sold note bound the defendant, and, also, that the signed entry in the broker's book was a sufficient memorandum of the bargain to satisfy the statute of frauds. Thompson *v.* Gardiner, 1 C. P. D. 777. While it was admitted that the authorities are conclusive to show that the broker, acting for one of the contracting parties, making a contract for the other, is not authorized by both to bind both, yet, in effect, it was held that the broker who makes a contract for one may be authorized by the other to sign a memorandum of the contract for him; and in Thompson *v.* Gardiner the court held that the facts showed sufficient authority to the broker to sign the memorandum for the defendant so as to bind him.

The plaintiff, on January 11, 1871, bought of the defendant a parcel of wool, worth £150. The following memorandum, containing the items agreed upon, was drawn up and signed by the plaintiff, but not by the defendant, and was handed to the defendant: "Bought Mr. J. G. Rust's wool as examined at," etc., "the whole to be cleared in about 21 days." None of the wool was delivered, and there was no part payment of the price. On February 8 the defendant wrote: "It is now 28 days since you and I had a deal for my wool, which was for you to have taken all away in 21 days from the time you bought it. I do not consider it business to put it off like this; therefore, I shall consider the deal off, as you have not completed your

part of the contract." The plaintiff had, in fact, completed his part of the contract on the true construction of the contract. On February 9, in answer to the plaintiff's request to see a copy of the contract contained in the memorandum of January 11, the defendant wrote (inclosing a copy): "I beg to inclose copy of your letter of the 11th of January." In an action for non-delivery of the wool, the Court of Exchequer held (Baxton *v.* Rust, L. R. 7 Ex. 1; affirmed on appeal by the Exchequer Chamber, *Ib.* 279), that the letter of the 9th, with its inclosure, taken in connection with that of the 8th, constituted an unambiguous recognition of the existence of the contract and of its terms, and that there was therefore a sufficient memorandum in writing, signed by the defendant, to satisfy the 17th section of the statute of frauds. The principle on which the case was decided is well stated by Channell, B., in the Court of Exchequer, L. R. 7 Ex. at p. 5, thus: "All that the statute requires is that the terms of the bargain should be proved by written evidence. Suppose, for instance, an agreement to buy goods at a fixed price, and a memorandum drawn up silent as to price, although the price was actually fixed, there would be no good contract. Again, a memorandum not disclosing the names of both parties would not be a good contract. But here all the terms were reduced to writing, and the defendant has, in fact, admitted that the written paper contained them all. If, when he inclosed the copy memorandum, he had said, 'I send you a copy of your letter, but it does not constitute evidence of any contract between us, because one term agreed on between us is entirely omitted,' the case would have been different. But he does nothing of the sort. He had put a construction on one of the terms which is incorrect, as the jury have found, and made that an excuse for withdrawal; but his admission of the contract and its terms was unequivocal." The courts held, in accordance with Bailey *v.* Sweeting, 9 C. B. N. S. 843, and Wilkinson *v.* Evans, L. R. 1 C. P. 407, that as long as there was a sufficient admission of the contract by the party to be charged, the fact that it was accompanied by a repudiation of the obligation to perform the contract, would not prevent its being used as an admission.

In Buxton *v.* Rust, L. R. 7 Ex. 279, 280, Willes, J., was inclined to carry to that case the doctrine of Shortrede *v.* Cheek, 1 A. & E. 57, and MacDonald *v.* Longbottom, 1 E. & E. 977, 987. In Buxton *v.* Rust, L. R. 7 Ex. 1, 279, a written memorandum of a contract for the purchase by the plaintiff of the defendant's wool, was signed by the plaintiff, but not by the defendant. Subsequently, the defendant wrote the plaintiff: "I shall consider the deal off as you have not completed your part of the contract." Willes, J., was inclined to think that having regard to the holding in Shortrede *v.* Cheek, 1 A. & E. 57, and MacDonald *v.* Longbottom, 1 E. & E. 977, 987, this reference to the contract was sufficient to incorporate the paper signed by the plaintiff with the letter written by the defendant. Referring to those cases, Willes, J., said: "In the former case it was held that the words 'the promissory note' used in a memorandum of a guarantee might be proved to refer to a certain promissory note made by the defendant's son and payable to the plaintiff. In the latter, evidence was admitted to show that the words 'your wool' referred to certain particular wool which the plaintiff had under his control at the time of the contract. And here it might, I think, well be contended that the contract mentioned in the letter of February 8, might have been shown to be the contract of January 11, and then that letter, on the principle that *verba relata inesse videntur*, would itself be sufficient." However, the case was not decided on that point; of the correctness of which the other judges of the Exchequer Chamber seemed doubtful. It is, of course, quite a different thing to show by parol what is the subject-matter of a contract referred to in a writing, from showing by parol what the whole contract itself is. Applying the principle of MacDonald *v.* Longbottom, 1 E. & E. 977, 987, to the latter case, and a contract wholly oral could be proved by such a reference.

In Nesham *v.* Selby, L. R. 13 Eq. 191, and on appeal L. R. 7 Ch. 406, the plaintiff, in a bill for specific performance of an agreement to take a lease of a house, alleged and produced evidence of a verbal agreement, which was denied by the defendant. In order to take the case out of the statute of frauds, the plaintiff relied on a letter written by the defendant, in which the defendant agreed to take the house for seven years on certain terms, but in which the day of the commencement of the lease was not mentioned; and on another letter from the defendant mentioning the day of commencement, and adding terms to which the plaintiff did not agree. The Court of Appeal, affirming the judgment of Lord Romilly, M. R., held that there was no memorandum of agreement sufficient to satisfy the requirements of the statute; the court expressing their opinion that they had gone quite far enough in decreeing specific performance upon letters as constituting agreements, where one side is bound and the other not.

In Baumann *v.* James, L. R. 3 Ch. 508, parol evidence was allowed to be given to connect written documents to satisfy the 4th section of the statute, under the following circumstances: A tenant applied to the landlord's solicitors as to the renewal of his lease. The solicitors sent him a report by a surveyor, who recommended the granting of a lease for fourteen years, at a given rent, if certain repairs were done by the tenant. The tenant wrote back assenting to the repairs and rent, but asked for a term of twenty-one years. No final agreement was come to; but some months afterwards a negotiation having proceeded between the tenant and landlord without the intervention of the solicitors, the landlord wrote a letter promising the tenant a lease for fourteen years "at the rent and terms agreed upon," to which the tenant wrote back an unqualified acceptance. It was held, affirming the judgment of Vice-Chancellor Stuart, that parol evidence was admissible to connect the report and the tenant's previous letter with the subsequent letters; and, it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, that there was a sufficient memorandum in writing to satisfy the statute of frauds.

One of the parties to a contract cannot sign the name of the other as his agent, so as to bind him, within § 17 of the statute of frauds. The signature as agent must be by a third person. The question came up in Sharman *v.* Brandt, L. R. 6 Q. B. 720. There, the plaintiff, a broker, carrying on business as "W. S. & Co.," was authorized by the defendants, B. & H., to buy for them in the market 200 tons of hemp. He drew up and forwarded to the defendants a contract note, as follows: "Bought for Messrs. B. & H., of our principals, 200 tons of hemp. W. S. & Co., brokers." The plaintiff had in fact no principals as sellers in the transaction; but the defendants had no notice of this. The defendants having refused to accept hemp under this contract, the plaintiff brought an action to recover damages therefor. On the trial before Blackburn, J., the plaintiffs were nonsuited. On application to the Court of Queen's Bench, pursuant to leave reserved, a rule for a new trial was refused; and, on appeal, the Court of Exchequer Chamber dismissed the appeal, holding that the plaintiff could not maintain an action on the contract, on the grounds that the contract in writing was with an undisclosed principal as seller, and that the plaintiff, if a party to the contract, could not sign as agent for the defendants to bind them within § 17 of the statute of frauds; Kelly, C. B., saying: "Without any authority, on first principles, a contract between a broker, though in his own person, but expressed to be as broker for an unnamed principal, and a purchaser, is not a contract made between the broker as unnamed principal, and the purchaser. This was therefore not a note of any contract at all between the plaintiff, as seller, and the defendants, as purchasers; nor was the memorandum signed in such a way as to be enforceable within the statute of frauds." See Wright *v.* Dannah, 2 Camp. 313; Farebrother *v.* Simmons, 5 B. & Ald. 333; Fairlie *v.* Fenton, L. R. 5 Ex. 169.

It is impossible to use an entry in an auctioneer's book for the purpose of proving a contract for sale within the statute of frauds, unless the entry comprises such a reference to the conditions of sale, subject to which the property was sold, as to identify them, upon production, as being the conditions mentioned in the entry. Hence, it was held that there was no sufficient contract in writing within the statute of frauds, and specific performance was refused as against the purchaser, where, at a sale by auction, subject to conditions, the auctioneer entered in his sale-book the names of the vendor and purchaser, the subject-matter of the sale, and the amount of the purchase-money, but omitted in the entry to embody or make any reference to the conditions of sale; there being no other memorandum or contract in writing. Rishton *v.* Whatmore, 8 Ch. D. 467. In Beer *v.* London & Paris Hotel Company, L. R. 20 Eq. 412, it was held that a contract signed by an auctioneer on behalf of an undisclosed principal is a valid contract under the statute of frauds.

In Smith *v.* Webster, 3 Ch. Div. 49, it was held that a letter written by a solicitor simply in that capacity, and not as the authorized agent of the party whom it was sought to bind, was not such a note or memorandum of an agreement as is required by the statute of frauds. There W. entered into a verbal agreement with A. to sell him an inn called the Lion Inn for £950. On the following day W.'s solicitor wrote to A.'s solicitor: "W. has been with us to-day, and stated that he had arranged with your client A. for the sale to the latter of the Lion Inn for £950. We therefore send herewith draft contract for your perusal and approval." The court held W. was not bound.

Where a bill for specific performance alleged a verbal agreement for the lease of a house by the plaintiff to the defendant for seven years from Michaelmas, 1870, followed, *first*, by a letter from the defendant to the plaintiff, which did not state when the term was to commence, and, *secondly*, by another letter of the defendant to the plaintiff, in which, after re-

ferring to the previous letter, the defendant stated that he thought it was best to say that it was clearly understood on his part that the plaintiff agreed to let the house for seven years from Michaelmas, 1870, upon certain conditions therein mentioned, some of which the plaintiff did not admit to form part of the alleged verbal agreement; it was held that neither the first letter nor the two together constituted a memorandum in writing of the alleged agreement sufficient to satisfy the requirements of the statute of frauds. Nesham *v.* Selby, L. R. 13 Eq. 191.

Where the N. commissioners agreed to sell a property to the defendant D., the contract did not refer to any plan, but the agents who signed it for the parties signed at the same time the following memorandum written upon a plan of the property: "Plan of property sold to and purchased by D., October 23, 1874. N. B. — The property included in the purchase is edged with red color;" it was held that the plan was sufficiently incorporated, and that the description in the contract was controlled by it. Nene Valley Drainage Commissioners *v.* Dunkley, 4 Ch. D. 1.

A letter of guaranty is an agreement to pay the debt of another on his making default, which by the statute of frauds must be in writing, and signed by the party to be charged. It cannot be added to by verbal evidence, nor by written either, if not signed by the guarantor, unless the written evidence is by a reference in the letter adopted as part of it. But as the statute does not prescribe the form of a binding agreement, it is sufficient that the material parts of it appear either expressed or clearly to be implied; and correspondence and other evidence may be used to ascertain the true import and application of the agreement, by the aid of which extrinsic evidence the proper construction may be made. Bell *v.* Bruen, 1 How. 169; Drummond *v.* Prestman, 12 Wheat. 515; Douglass *v.* Reynolds, 7 Peters, 113; Lee *v.* Dick, 10 Peters, 482.

In Davey *v.* Shannon, 4 Ex. Div. 81, the statement of claim alleged that in 1866, the defendant entered into the plaintiff's employment as a foreman tailor for three years, on the terms that if he should leave the plaintiff, he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor within five miles of D.; and that, after the expiration of the three years, he continued in the plaintiff's employment on the like terms, except as to the period of employment, till 1877. The breach was that in 1877, the defendant left the plaintiff, and carried on business as a tailor in D. The defence relied on was that the contract was not in writing, and as it was not to be performed within the year, it was void within the statute of frauds. On demurrer it was held by Hawkins, J., that the contract amounted to an agreement not to set up the trade during the joint lives of the defendant and the plaintiff; and was, therefore, *prima acie* not to be performed within a year, and therefore fell within the statute.

The appellant was mortgagee of a farm in Mississippi, and it was verbally agreed between her and the administratrix of the mortgagor, that certain cotton was to be taken as a payment on the mortgage. The price was fixed at twenty cents a pound, but the number of pounds was not definitely ascertained; neither was any payment indorsed upon the mortgage, nor any receipt given, nor any memorandum in writing made, nor any present consideration paid. Neither did any change of possession take place, nor was there any delivery, actual or symbolic. The Court of Claims held, affirmed by the Supreme Court of the United States (Mahan *v.* United States, 16 Wall. 143), that under the Mississippi Statute of Frauds (Revised Code of 1857, p. 359, art. 4 of chap. 44) the agreement passed no title to the cotton.

In Huntley *v.* Huntley, 114 U. S. 394, it was claimed that an interest in a stage-coach company was transferable as stock in corporations, and therefore that an agreement for the transfer of such interest as transferable shares, must be in writing, under the statute of frauds in force in the District (District of Columbia), with reference to a contract for the sale of goods, wares, and merchandise. The court, without deciding whether a contract for the transfer of such an interest comes within the statute or not, held that both the written and verbal evidence in the case showed that the contract had been so far executed between the parties that their rights and obligations could not be affected by the statute.

An agreement required to be in writing and to be signed by the party sought to be charged, which was not signed by him, but was by the other parties to the agreement, was held to be proved by a reference to it in letters written by him, in which he referred to it as "the agreement," and making reference to its contents; parol evidence being held to be admissible to show that the agreement produced was "the agreement" which was referred to in the letters. Beckwith *v.* Talbot, 95 U. S. 289. And see Johnson *v.* Dodgson, 2 M. & W. 653; Salmon Falls Co. *v.* Goddard, 14 How. 446.

A proposal in writing, signed by the party to be charged and accepted by parol by the party to whom it is made, is a suf-

ficient memorandum or note of an agreement to satisfy the 4th section of the statute of frauds, and, *semble*, it is also sufficient to satisfy the 17th section. Reuss *v.* Picksley, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, L. R. 1 Ex. 342.

Although the commercial law of all countries treats insurance as made in writing by an instrument denominated by us a policy; yet such a contract is not within the statute of frauds, and, under the common law, a promise for a valuable consideration to make a policy of insurance is no more required to be in writing than is a promise to execute and deliver a bond, or a bill of exchange, or a negotiable note. Commercial Mutual Marine Insurance Co. *v.* Union Mutual Insurance Co., 19 How. 318; First Baptist Church *v.* Brooklyn Fire Ins. Co., 18 Barb. 69; Hamilton *v.* The Lycoming Co., 5 Barr, 339; Sanford *v.* The Trust Fire Ins. Co., 11 Paige, 547.

By amendment of April 1, 1872, to the General Statutes of Missouri of 1865, ch. 99, sec. 2, it was enacted that innkeepers there shall not "be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn, nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample." Under this statute the court held that if, as to such merchandise, it is intended to hold the innkeeper to the strict liability imposed, at the common law, in respect to the baggage or other personal property of a guest, the statute indicates the mode in which that intention must be manifested. The guest must give notice of such intention. And as the notice is expressly required to be in writing, no other form of notice can be deemed a compliance with the statute. Fisher *v.* Kelsey, 121 U. S. 383; Porter *v.* Gilkey, 57 Mo. 235, 237. See also Myers *v.* Cottrill, 5 Biss. 465, 470; Burgess *v.* Clements, 1 M. & S. 306.

In Clark *v.* United States, 95 U. S. 539, the majority of the court held that sec. 1, of the "act *to prevent fraud on the part of officers* intrusted with the making of contracts for the government," 12 Stat. at Large, 411, and which required the officers in three of the departments, "immediately after the passage of this act, to cause and require every contract made by them severally on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof, a copy of which shall be filed by the officer making and signing the said contract in the returns office," &c., rendered illegal all contracts made by those departments which were not reduced to writing. The minority of the court (Miller, Field and Hunt, JJ.) dissented from this holding, and were of the opinion that Congress intended nothing more than to regulate the conduct of its own officers, in compelling them to furnish all the evidence in their power of the contract and the circumstances attending its negotiation, and that it was going a long way to hold, that by an act which contained no declaration that a parol contract should be void, or that it should not be enforced, or that no suit could be sustained on it, was passed for the purpose of establishing an entirely new rule as to the validity of contracts, at variance with any law heretofore known in this country, or perhaps, in any other. We think the decision of the majority extremely doubtful, and that the holding of the minority, that the act, imposing certain duties on the officers of the government and inflicting certain punishments on them for the non-performance of such duties, was simply directory, and did not render invalid contracts which, otherwise, could be legally made by those officers. Not only the title of the act, but the entire language of the section, show that the design of the act was not to enact a new Statute of Frauds, but was to prescribe the duty of officers relative to contracts "*made by them* severally on behalf of the government," and all the other items of the prescribed duties of the officers, outside of the single act of signing the contract, were of such a nature as to be out of the power of the other contracting party to have them enforced. Why, under the act, the contract was to be treated as invalid because "*the duty*" (for that is all that it was as affecting the contract) of the officer in one respect was not performed, and was to be perfectly valid if such *duty* were done in the one respect, though left undone in all the other particulars, certainly does not seem, *as a mere matter of the construction of a statute*, clear. And yet as to all the other duties, the court, in its construction of the act, held that with reference to them the act is only directory, and though none of them had been performed the contract remained valid, although, as far as the officer was concerned, the non-doing of any one of those acts by him was as "unlawful" as that of his not having had the contract "*made*" *by him*, signed. See 95 U. S. at p. 542.

ANALYTICAL INDEX.

References are to both text and notes.

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326, 327 secretary without authority, company held estopped by act

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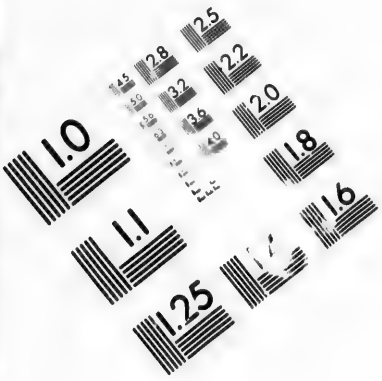

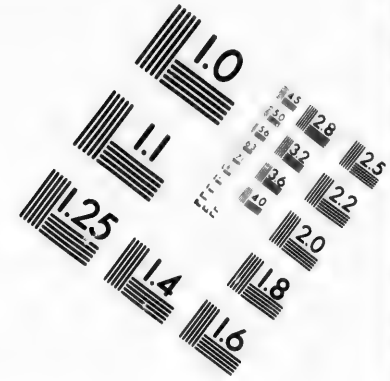

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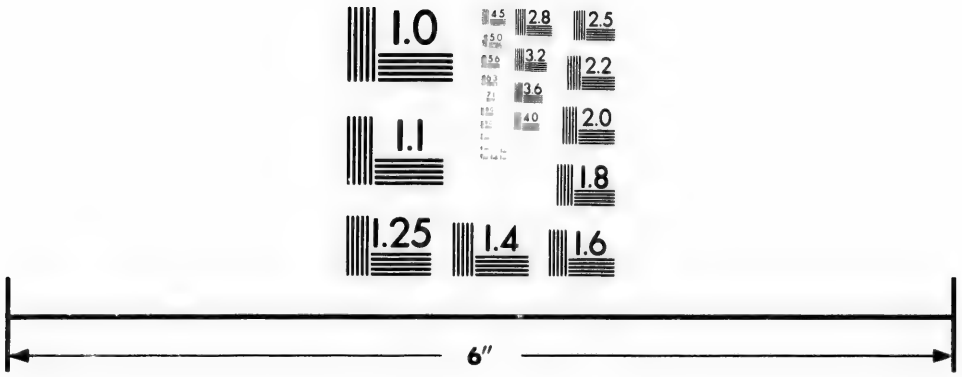

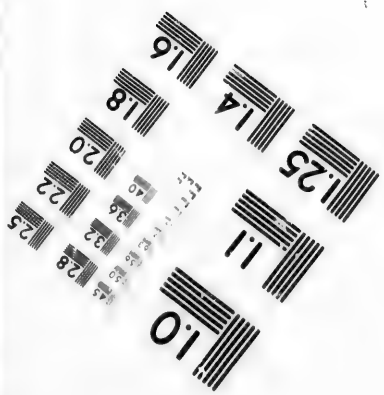

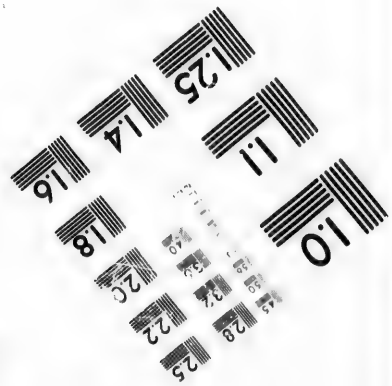

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REVOCATION. (See FIDUCIARY RELATIONS; FRAUD; GIFT; RATIFICATION; RESCISSION; SALE.)

SALE. (See BAILMENTS; BARTER; DEFINITIONS; INTOXICATING LIQUOR SALES; PLEDGE; PRICE. For Purchases and Sales by Agents, Corporations, Drunkards, Infants, Lunatics, Married Women, Ship-masters, etc., see under these respective headings.)

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the cases and the subject, containing irreconcilable *dicta*, discussed . . . . . ii. 260, 261

where the work is done on the materials of the employer so that the property remains vested in him, work and labor lies . . ii. 260

but where the property remains in the maker, outside of express contracts for work and labor, or where such a contract is to be implied, and the subject is the subject of a sale, the contract is within the 17th section of the statute . . . . . ii. 261

this deduction sustained in Lee *v.* Griffin in the extreme case of a contract for making two sets of teeth, which was held to come within the 17th section of the statute . . . . . ii. 261, 262

the cases further reviewed sustaining the above conclusions . ii. 262–264

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